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FEDERAL REGULATION OF THE RAILROADS TO APRIL 6, 1917

by

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FEDERAL REGULATION OF THE RAILROADS TO APRIL 6, 1917

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Chapter One

The Importance of Railroads

A discussion of Federal regulation of the railroads prior to 1918 necessarily involves a discussion of the general significance of railroads in our economic and industrial system, and the growth of state and federal regulation prior to the Interstate Commerce Act of 1887, the first major federal act to regulate the carriers. Thus we will just discuss the general significance of railroads in our economic system. In the following chapter we will discuss the extent of railroad development in this country before 1887, and the conditions which brought about state and federal regulation of the carriers.

Railway transportation has played a very important part in the economic and industrial development of the United States. Could one possibly conceive the extremely rapid economic progress of the United States without connecting it with the development of our railway transportation facilities? How many sections of inland America, without adequate water transportation facilities, could have thrived with the land transportation facilities of 1820? The answer to these questions is quite obvious. It is possible for towns and even small cities to be erected without water transportation facilities; depending solely upon horses and wagons or similar means to carry their goods from place to place. But the growth a giant metropolis without railway transportation is quite inconceivable. Suppose that Pittsburg had been deprived of railroad facilities. How far would the city have progressed as the center of iron and steel manufacturing? Pittsburg is only one of the innumerable examples indicating the dependence of cities upon railroad

transportation.

The railroads have been a truly indispensable element in the establishment of our present social system. The carriers are used not only to transport raw materials to the manufacturing centers, but to convey the finished products to the great distributing centers, the smaller cities and towns, the wholesale merchants, the retail merchants, and in many cases directly to the homes of the consumer. Professor Logan G. McPherson aptly demonstrates the manifold functions of railroad service in the following statement, "As every farmer and farmhand directly or indirectly consumes the products of mill and factory, and every manufacturer and worker in mill and factory consumes the products of the farm, and so on throughout industry and commerce, every producer is a consumer and every consumer is a producer, with the exception of workers in the arts and professions, who are not engaged in material production consume and produce material goods."[1].

One of the important effects of railroad construction is that as a result of the lowered cost of moving goods from place to place, people have transferred manufacturing plants from the primary sources of raw materials, namely where the raw materials are extracted or grown, to the secondary production areas, where goods are manufactured or finished, and then redistributed to the areas where they are consumed. The natural advantages of proximity to the raw materials has thus been nullified by the shift of the major phases of production

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[1]. McPherson, L.G.: "R. R. Freight Rates in Relation to the industry and commerce of the U. S." p. 3

to the marketing areas. The above movement has been counteracted to some extent by the recent tendency to develop in some instances the raw materials into finished products at their source wherever profitable, and then shipping the finished products to the marketing areas. As freight rates increase on raw materials the above tendency will undoubtedly become more pronounced.

Railway transportation influences the production of goods profoundly, by enabling the development of large scale production, because it opens up large marketing areas to the producers. Thousands of miles of territory have been opened to the products of industry through the development of railroad lines. Railroads also enable the public to satisfy demands of all sorts at any particular place; the consumption of citrous fruits in northern markets, that could not possibly be brought about without railroads because of the perishability of the products in question. Railroads have also contributed to the rapid growth of commerce by enabling seaports to serve large areas. Goods can be carried from the interior to the seaport, and goods can be sent from the seaport to the innermost parts of the country. This connection of inland cities and towns with seaports by means of railroads has naturally resulted in an enormous increase in the number and amount of commodities handled in commerce.

The carriers have also been a dominant factor in the accumulation of wealth within the country. The rate of return on the wealth has been lowered considerably through, for the supply of wealth is so abundant that the interest rate was necessarily lowered. This decrease in the rate of return on capital, however, has been far slower than it would have been,

if the railroads had not made possible a corresponding increase in the opportunities for investment.

In 1902 there was a mile of railroad for every four hundred people, or an aggregate mileage of 196,000. The railroads employed one out of every hundred workers, and were capitalized at about one-eighth the total wealth of the country. The annual gross earnings of the railroads amounted to $23. per person, and the net earnings to $7.67 per capita, a sum equivalent to a $2. yearly dividend for all the persons in the country. The railroads had a freight car for every fifty-five persons, and a passenger coach for every sixteen hundred persons. The average mileage covered per person was 218, and tons of freight per capita was 1860.[2]

Railroads have at times exerted great pressure over Congress and numerous state legislatures in order to secure special bills or exceptional privileges in their franchises. Numerous towns have been made economic and industrial centers because of the presence of railway lines, while other towns have been ruined through the failure of railways to pass through their districts. Fortunes have been made through improper railway promotion and corrupt management.

Railroads have played a very important part in lowering commodity price levels. Before the development of railways, many raw materials had to be produced near the point of consumption, because the cost of transporting bulky commodities was prohibitive. Hence the eastern states produced large

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[2] Meyer, B. H.: "Railway Legislation in the United State", p. . 4

quantities of wheat, corn, and other agricultural products on the inferior soils of the eastern seaboard, before the development of the railroads. The production of wheat on the inferior soils of the East naturally meant high costs of production in agricultural products. However, with the advent of the railroad, New England and the Eastern States could depend upon the middle west for their raw materials, and specialize in manufacturing on a large scale. This action of the East tended to cause a greater efficiency in the production of both farm and industrial products, lowering the cost per unit and increasing the supply of good brought upon the market. This lowered unit cost and increased supply of goods brought about a relatively lower commodity price level than that of the pre-railroad era.

The railroads have also aided in the formation of the very high standard of living in the U.S. The railway made it possible for goods to be carried in enormous quantities at low rates, and thereby destroyed the economic self-sufficiency of the earlier period of our country's development. Thousands of rural settlements were enabled through the railroads to enjoy cooperative endeavor; and even isolated settlers are able to draw for the satisfaction of their wants upon the storehouses of the world. In fact the isolated settlers are able to purchase goods in large quantities from all sections of the country. at relatively low prices compared with those of of previous centuries. Goods that were considered luxuries in former generations are now considered necessities. Thus this improved standard of living can be partly attributed to the railroads because the carriers have played an important part in the rise of large scale industry and have enabled us to satisfy the wants that arise in our economic system, a system in which wages are far higher than in any previous century, and in which high pressure

salesmanship constantly creates desires for new products that are brought upon the market in infinite numbers and in enormous quantities. It becomes increasingly difficult for the average citizen as the years pass by to clearly visualize the condition of labor a hundred years ago. In inland districts manual labor supplemented by animal powere was the order of the day. Men performed prodigious tasks for very meagre wages, and secured very few of what are now considered the necessary comforts of life. Can the present generation visualize the time when the people were not able to enjoy the comforts of present day sanitation, plumbing, lighting, homes, automobiles, radio, telephones, trains, airplanes stoves, electric appliances, widespread education, and innumerable food delicacies. The list is far too lengthy to enumerate here. But if we could concieve of our being deprived of many products that we accept as necessaries and the innumerable luxuries of the present day, we could appreciate the standard of living that existed a century ago, a standard that is comparable only to what we would consider as a semi-civilized state of society. Of course the author does not attribute the growth of our present standard of living solely to the railroads, but he wishes to demonstrate that the carriers have played a far more important part in the development of our present standard of living than most people imagine.

Railroads were largely responsible for the very rapid growth of the West. In a comparitively few years vast areas were opened for settlement. People followed behind the railroad

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[3] Trottman, N. "History of the Union Pacific," pp. 23-98

See Moody, J., "The Railroad Builders," pp. 120-137

lines, and almost overnight hundreds of small towns sprang up along the railroads as they stretched further into the West.[4] This development was so rapid that by 1890 the American frontier had vanished, and only scattered areas of land remained under Government control.

Possibly one of the greatest benefits derived from railroads in their earlier stages of development was the unifying force that they exerted over the various sections of the country, a force which brought the various sections of the country into far closer relations than was thought conceivable in 1800. This unifying force prevented, in the earlier stages of the country's development, the emergence of factors which might have caused violent discord between the different sections of the country, and which might have readily led to the splitting up of the United States into a multitude of relatively small states.

In spite of the many evils connected with railroad operations in this country such as, the corruption of construction companies, the crooked financial organization and management of railroads by financiers, their manipulation of state legislatures and even Congress to secure special privileges, their wilful destruction of communities by failing to extend the line into those communities because they would not pay the price asked, and their issuance of rebates and other forms of special privileges to certain shippers, the influence of the railroad on the country's development has on the whole been for the good of the nation.

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[4] For more detailed information concerning the effect of railroads on our frontier, see Paxson, F.: "History of the American Frontier," p. p. 402-422

Chapter Two

The Development of Opposition to Railroad Mangement

Of course it is impossible in the scope of this work to trace in any detail the extent of railroad development at the time of the Interstate Commerce Act of 1887. Naturally the following discussion must be limited to a brief sketch of the extent of railway development at that time, showing the mileage of the railways, and pointing out the gradual rise of some of large railway systems.

In 1890 there were 163,597 miles of railways in the United States. The leading states in the order of their mileage were Illinois, Kansas, Texas, Pennsylvania, Ohio, and New York.[5] By 1850 the movement started by which the short lines were gradually consolidated into railway systems. This movement progressed rapidly, and by 1869 Commodore Vanderbilt had consolidated numerous small lines into the present New York Central System, which stretched from New York City to Chicago.[6] In the same year the Pennsylvania Railroad reached Chicago, and in the following year it extended to St. Louis. In 1869 the Union Pacific and the Central Pacific were joined at Ogden, thus connecting Omaha with Sacramento. The Baltimore Ohio which already had reached St. Louis, extended its lines into Chicago in 1874. In the same year the Grand Trunk connected Milwaukee and Detroit with the Atlantic ports. The Atchison, Topeka and Santa Fe reached Derning, New Mexico in 1881

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[5] Jones, E.: "Principles of Railway Transportation," p. 64, et seq.

[6] Moody, J.: "The Railway Builders," p. p. 20-46

and there connected with the Southern Pacific to reach San Francisco. In 1883 the Northern Pacific connecting St. Paul with Portland ,Oregon was completed. In the same year the Southern Pacific put into operation a line from New Orleans to the Western Coast by connecting with the Texas and Pacific at El Paso,Texas. In 1884, the Union Pacific connected Ogden with Portland,Oregon. In 1888, the Atchison ,Topeka and Santa Fe reached Chicago and thereby connected Chicago with Los Angeles. Of course,at ehe time of the passage of the Act of 1887 the railroads in this country had made such progress that a complete discussion of the railroad net work at that date cannot be considered within the scope of this work.

There were numerous causes for the agitation for Federal regulation of the railroads. The author cannot pretend to chronicle all the causes for this agitation,because they were far too numerous. The farmers of the West and South were probably more vitally interested in railroad development and regulation than the Eastern section of the country. Their very means of subsistence depended upon the sale of their surplus grain and other foodstuffs to the thickly settled East and to Europe. Cheap transportation costs would enable them to compete with the farmers of the East and of Europe on better than even terms. The existence of very extensive areas of virgin soil enabled the western farmer to produce enormous quantities of wheat at a very low cost per bushel, compared with the higher costs per bushel attending the more intensive farming methods employed in Europe. The future development of the West--

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[8] Jones, E., " Principles of Railway Transportation," p. 95

and later connected with the Southern Pacific to reach San Francisco. In 1883 the Northern Pacific connecting St. Paul with Portland, Oregon was completed. In the same year the Southern Pacific put into operation a line from New Orleans to the Pacific Coast by connecting with the Texas and Pacific at El Paso, Texas. In 1884, the Union Pacific connected Ogden with Portland, Oregon. In 1885, the Atchison, Topeka and Santa Fe reached Chicago and thereby connected Chicago with Los Angeles. Of course, at the time of the passage of the Act of 1887 the railroads in this country had made such progress that a complete discussion of the railroad net work at that time cannot be considered within the scope of this work.

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[8] Jones, E., " Principles of Railway Transportation," p. 30

in agriculture depended upon the availability of markets for their excess grain. The market for Western products would be available only if the west could compete on favorable terms with the farmers of the East and Europe. Unless the freight rates between the West and Europe were low enough to enable the Western farmer to deliver grain in Europe at a cost (a cost including cost of growing wheat, handling it, and shipping it to Europe) at least as low as the production costs of the European farmer, the Western farmer ~~will~~ would be unable to offset the advantages accruing to the European farmer, namely, that of proximity to the market for grain. In other words the combined cost of growing the grain and transporting it to Europe must be as low as the cost of growing grain in Europe, or the West would be unable to compete with European farmers. Hence it was a foregone conclusion that Western farmers would agitate for very low rates on farm products.

The development of the West was aided greatly by railroad lines. The people of the West soon appreciated this fact and endeavored to secure as many railroads through their territory as possible. The significance of this movement can be indicated by the magnitude of the rewards offered to railroad companies that constructed railroads in the period between 1850 and 1870.[8] During that period the Federal Government aided the railroads, in the following way:

Tax exemptions were permitted in some charters forever, in others for a stated period, and in others until the dividends

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[8] Jones, E.: "Principles Railway Transportation," p. 186.

should reach a certain point. Moreover the Federal Government originally granted nearly 200,000,000 acres of land to railroads, an amount subsequently reduced, however, to 155,000,000 acres, by forfeitures resulting from inability of the railroads to meet the requirements of the law. National bonds to the amount of $64,623,512. were also issued on second mortgages to aid certain transcontinental lines. In addition, state aid took the following forms:

1. the subscription to the capital stock of the railroads by the state. This method was used by many states, and in New York state alone, cities and towns contributed $29,978,206;
2. the loan of state credit by direct purchase of bonds or endorsement of bonds;
3. State land grants amounting to $55,000,000 acres were given to the carriers; and
4. the expenses of the surveys were paid by the states.

In view of the magnitude of this aid given to the railroads, it was inevitable that both the state and federal governments would eventually supervise the operations of the railroads so as to protect the people from exploitation by the carriers.

People all over the country insisted upon adequate railway service. They insisted that railroad lines, once instituted, should continue to operate indefinitely. Many towns and cities were established, because of their proximity to railroads, and if railroad service was suspended temporarily or done away with entirely, the people of those communities would be deprived of their real connection with the outside world. Thus, those who were interested in new lands for settlement, and those that wished to retain the railroad service that they had, naturally

appealed to the state or Federal Governments to compel the railroads to give them adequate service, and to require the railroads to continue their service indefinitely.

The West, in the period before 1875, being a section of the country in which the economic development was relatively primitive, was inevitably indebted to Eastern capitalists. Enormous sums of capital were needed to develop the economic resources of the West. However funds which are available to exploit new regions or countries, can be found only in sections whose industrial and commercial development has progressed sufficiently to permit the accumulation of surplus funds. This accumulation of capital goes on at a rapid rate as the industries of a country become more fully developed. As the industries of the country become fully developed, it becomes increasingly difficult to invest funds profitably, and as a result investors are always willing to risk investments in undeveloped countries in the hope of making large profits. As the East was well advanced industrially in the period between 1863 and 1880 it was able to invest large sums in the West without seriously interfering with its economic and financial structure. The debtor West was well acquainted with the fabulous profits made from railroad promotion and management. The large profits secured by Vanderbilt after his ruthless tactics employed in assembling the parts of the New York Central System incited public indignation[9]. The corruption attending the "credit mobilier" scandal[10]. in which members of Congress were involved

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[9] Moody, J.: The Railroad Builders," p. p. 20-46

[10] Trottman, N.: "History of the Union Pacific," p. p. 71-89

with the promoters of the Union Pacific, brought about a congressional investigation and vigorous public condemnation. The news of excessive profits made by promoters in the building of the Central Pacific also heightened public indignation.[11] The struggle between Jay Gould, Vanderbilt, and Daniel Drew for the control of the Erie[12] in which all three attempted to secure control over the New York Legislature, finally resulted in Gould's favor, Drew being ruined and Vanderbilt losing $8,000,000 in a corner in the market. This episode stirred public opinion and brought about public condemnation of railroad promoters. The Westerners were unwilling to permit the eastern capitalists to further increase their fortunes by means of excessive rates on western products. This fear of exploitation by eastern capitalists was one of the major factors behind the attempts of western state legislatures to regulate the railroads. In fact the corruption of railroad management was so widespread that it alone might be considered sufficient cause to warrant government regulation.

When the New York Central and Pennsylvania systems entered Chicago in 1869, bitter rate wars broke out between the two carriers. In the Autumn of 1868, the rate from New York to Chicago was $1.88 on first-class goods and 82 cents on fourth-class goods per 100 pounds. In 1869 the rates fell to 25 cents per hundred pounds. Rates, however, subsequently advanced, but in 1874 when the Baltimore and Ohio reached Chicago and the Grand Trunk connected Milwaukee and Detroit with Atlantic ports, a very

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[11] Moody, J., "The Railroad Builders," pp. 64-104

[12] Ripley, W. Z., "Railway Problems," pp. 1-61

serious rate war broke out. First-class rates dropped to 15 cents and fourth-class to 10 cents a hundred pounds. This condition led to the formation of a pool between the competing companies, whereby they allotted each other a certain percentage of the profits made by the group. Another example of this type of pool was the Southern Railway and Steamship Association, organized in 1875. [13] Many pools were organized after 1870, and some of them were very successful. The public became incensed over these pools and rate agreements, and brought stong pressure to bear on their state legislatures to prevent pools. As a result, pools were forbidden in many Western states, and this prohibition of pooling was later incorporated into the Inter State Commerce Act of 1887.

According to Professor Fauulkner, " Despite the uncertainty of dividends and interest payments on railroad securities, over $1,250,000,000 was invested in them in the period between 1830 and 1860."[14] Professor Miller states, "The total capitalization of railroads in 1873 was in excess of $3,000,000,000, and by 1890 it was $8,984,234,616." [15] Railroad securities were widely held, many being owned by western farmers. Very few of these roads were paying dividends in the decades of the seventies, while many others were going into receivership in the period between 1873 and 1878. The poor financial condition of the railroads naturally brought about the demand for regulation of the corrupt management of the the railroads by the investing public.

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[13] Jones, E., " Principles of Railway Transportation," pp. 95-99 for further examples of ruinous competition.

[14] Faulkner, H.U., " American Economic History," p. 332

[15] Miller, S.L., " Railway Transportation, Principles and Point of View," p. 150 and p. 470

Considerable agitation for regulation of the railroads came from business interests. Freight rates varied greatly in the period after 1868.[16] In the period between Autumn of 1868 and summer of 1869 first-class freight rates from New York City to Chicago fell from $1.88 per hundred pounds to 25 cents a hundred. Such rate variations naturally caused considerable hardship to both purchasers and sellers of goods, for purchasers were unable to predict accurately what goods would cost them delivered. If goods were to be shipped in three months, freight rates might rise in the meantime so that the seller would be unable to make a profit on them; on the other hand if the rates decreased, he would secure an additional gain. This uncertainty over rate schedules, was decried by sane business men, for it naturally caused wide fluctuation in the demand for goods, which of course seriously affected production schedules of manufacturers. Small business men, who were the ~~big~~ majority of business men of this period, were strongly opposed to the railroad's practice of granting rebates and other special privileges to large shippers. One of the worst offenders in this respect was the Standard Oil Trust,[17] whose business was built up largely from rebates and preferential treatment from railroads. Business men were also opposed to the long and short haul principle, by which a higher rate was charged

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[16] Jones, Eliot: "Principles of Railway Transportation," p.p. 956

[17] Seager, H. R.: and Gulick, C.A.: "Trust and Corporation Problems," Chapt. VIII p.p. 96-124

for a short haul than for a long haul, even though the products were carried over the same line. Thus the rate from New York City to Chicago was lower than the rate from New York City to Troy, New York. The business men also desired uniform and continuous service.

Chapter Three

State Regulation of the Railroads Prior to 1887

A discussion of state regulation of the railroads prior to 1887 is essential to a proper comprehension of the Interstate Commerce Act of 1887, for many of the state laws of that period were inserted in the Act, and the Act itself was rendered necessary because of the failure of those laws to properly regulate the railroads.

The first specific regulation of freight came in the charter of the Utica and Schenectady Railroad in 1833.[18] Owing to the opposition of the Erie Canal, the carrier was prohibited from carrying any goods, except passenger's baggage. This prohibition continued until 1844 on all the railroads that extended across the state, when, in that year, the carriers were permitted to carry goods whenever the canal was closed, upon the payment of tolls. These restrictions were removed in 1851. Early charters in Massachusetts allowed the railroads to levy such tolls as they saw fit, but the legislature was allowed to reduce the rates if more than ten per cent per annum were received above the cost of the road. The Legislature also reserved the right to purchase the roads at end of 20 years after their completion.[19] The Camden and Amboy Railroad, incorporated in 1830, in lieu of taxes the company was to pay a transit duty of 10 cents a passenger and 15 cents a ton on freight. If the state granted another

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[18] Meyer, B. H.: "Transportaion in the U. S. Before 1860," .p. 355
[19] Meyer, B. H.: "Transportation in U.S. before 1860," .p. 355

carrier a charter, which permitted the new carrier to extend to within three miles of Camden or Amoby, the duty was to cease. The State reserved the right to purchase the road after 30 years.[20.]

These early attempts to regulate railroads through charters failed because of the vagueness of the provisions contained therein, and a most childlike confidence in the efficacy of competition, and a need for additional mileage, which was greater than the desire to control existing roads.

The commission type of control had its beginning in 1832, when a Connecticut charter named three commissioners who were not interested in any way in the company but were responsible for the trust placed upon them. In 1836 Rhode Island provided for a commission with the power, upon complaint or whenever a majority of them thought it expedient, personally to examine into any or all of the transactions or proceedings of any railroad corporation that is now or may be afterwards authorized and established in this state, in order to secure for all the citizens and inhabitants of the state the full and equal privileges of the transportation of passengers and property at all times......[21.] The commission was given the authority to inquire into all agreements between steamships and railways. In 1845 New Hampshire provided that an official be appointed to investigate and collect information concerning railroads and their relation to the state. During the next decade Vermont, Connecticut, and New York created bodies of inquiry, and in 1858 Maine established a railroad commission. However, the functions of these early commissions were

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[20.] Ibid: .p. 383

[21.] Miller, S.C.: "Railway Transportation," .p.702

were very limited, and concerned mainly the appraising of private property taken by the railroads, apportioning revenues of interstate traffic among the different states, and collecting financial and traffic information.

However there was a demand for greater control, because of the ineffectiveness of the early Commissions in handling railroad problems. The advisory Commission, as a means of control, first appeared in Massachusetts in 1869. The Massachusetts commission was composed of three men who were appointed by the Governor with the consent of the council. All costs of the commission's activities, however, were to be borne by the railroads. The powers of the commission were briefly as follows:

(a) to examine the carriers activities and determine if they were complying with the provisions of their charters and the statutes;

(b) to investigate the activities of the carriers upon complaint or on their own account. The commission was given the power to summon witnesses, and to compel testimony under oath from them;

(c) to advise the carriers concerning security and accommodation of the public;

(d) the commission was given power to prescribe uniform railway accounting and to inspect the records of the carriers;

(e) to serve as an arbitration board in disputes between the railways and the public, and

(f) to render annual reports to the legislature, describing

the condition of the railway systems.[22]
Though the Commission had no power to enforce its judgments, and was compelled to rely upon public opinion and legislative action; the Commission was very successful, because of the masterly manner with which the commissioners handled complaints. In fact the Commission was so successful that it was not until 1913 that it secured mandatory powers. In the middle eighties, all the New England states, and New York, Ohio, Michigan, Wisconsin, Minnesota, Iowa and Virginia had advisory commissions.

Beginning with 1870, particularly in the Middle West, there spread a wave of drastic legislation, designed to regulate railroads, and especially their rates. This movement, later became known as the Granger movement[23] because the motivating force behind it was the National Grange of the Patrons of Husbandry, organized in 1867. Professor Faulkner states, "As a whole the Granger Acts sought (1) to establish, either by direct legislation or through a commission, schedules of maximum rates; (2) to prohibit a greater charge for a short haul than for a long haul;[24] (3) to preserve competition by forbidding the consolidation of parallel lines; and (4) to eliminate the evil of

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[22] See Miller, S. L.: "Railway Transportation," p.p. 703ff

[23] Brief accounts of the Granger Movement may be found in
E, Jones "Principles of Railway Transportation," p.p. 185-196
S. L. Miller: "Railway Transportation," p.p. 705-713
H. U. Faulkner: "American Economic History," p.p. 462-465

[24] For excellent explanation of Long and Short Haul see Vanderblue, K.F. Burgess: "Railroads, Rates-Service-Managerment."

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[22] See Miller, S. L.: "Railway Transportation," p.p. 707-717
[23] Brief accounts of the Granger Movement may be found in E. Jones: "Principles of Railway Transportation," p.p. 185-199
S. L. Miller: "Railway Transportation," p.p. 708-712
H. U. Faulkner: "American Economic History," p.p. 462-465
[24] For excellent explanation of Long and Short Haul see Vanderblue, H.B. Burgess: "Railroads, Rates-Service-Management."

granting free passes to public officials,"[25] Naturally the number of grievances of the people is far too large to repeat here. Another important grievance and one which was considered particularly obnoxious by the people was the practice of granting of rebates and other forms of personal discrimination that the railroads extended to favored customers. In fact Professor Parsons lists over sixty forms of personal discrimination.[26] The populace was opposed to the use of pools and other forms of associations which tended to restrict competition. The public also was incensed by the widespread corruption of railroad management, operations, and finance.

In Illinois a law was passed in 1869 which stated in general terms that the railroads should be limited to just, reasonable, and uniform rates. In 1870 an amendment to the state constitution declared that the railroads were public highways. The amendment prohibited stock-watering and the consolidation of competing lines, and required the railroads to make annual reports to the state. It directed the legislature to pass laws to correct these abuses.[27] The Legislature passed a series of laws in 1871 which provided for the prohibiton of discrimination, the use of a sliding scale of maxima rates based on the size of the roads within the state, the prohibition of higher rates for short hauls than long hauls, the establishment of a commission of three men to

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[25] Faulkner, H. U.: "American Economic History," p. 463

[26] Parsons, Frank: "The Heart of the Railway Problem," p.p. 228-232

[27] Daggett, S. R.: "Principles of Inland Transportation," p.p. 473-480

investigate the railroads' activities, and the regulation of the handling of freight. An act passed in 1873 stated that if personal or local discrimination were discovered, it would be a "prima facie" case of unjust discrimination, and provided for heavy penalties for such violations.

Minnesota in an act passed in 1871, provided for fixed maximum rates; railroads were to be declared public highways, discrimination was forbidden, penalties for violations were prescribed, and a railway commissioner was created to investigate railroad operations. In 1874 an act was passed with provisions similar to those of the Illinois Act of 1873. Within the years of 1874-75 both Iowa and Wisconsin passed laws which established regulations similar to those of Illinois and Minnesota. In fact, between 1870-76, Missouri, California, Nebraska, Kansas, Oregon, and a number of southern states passed laws similar to those of Illinois.

According to Professor Daggett, "For one thing, there is little evidence that the Granger laws actually caused serious loss to the carriers. The Illinois law was not enforced until 1880. Even in Wisconsin, the state which is popularly supposed to have been most unfavorably affected by maximum rate regulation, the increase in net earnings between 1873 and 1876 was greater than ever......"[28]. However, there seems to be a difference of opinion among writers concerning the affects of the Grange laws on railroad revenues; for the majority seem to believe that the

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[28] ibid: .p. 476

investigate the railroads activities, and the regulation of the handling of freight. Another act passed in 1872 stated that if general or local discrimination were discovered, it would be a "prima facie" case of unjust discrimination, and provided for heavy penalties for such violations.

Minnesota, in an act passed in 1871, provided for fixed maximum rates; railroads were to be declared public highways, discrimination was forbidden, penalties for violations were prescribed, and a railway commissioner was created to investigate railroad operations. In 1874 Wisconsin passed an act with provisions similar to those of the Illinois Act of 1873. Within the years of 1874-76 both Iowa and Missouri passed laws which established regulations similar to those of Illinois and Wisconsin. In fact, between 1870-76, Missouri, California, Nebraska, Kansas, Oregon, and a number of southern states passed laws similar to those of Illinois.

According to Professor Daggett, "For one thing, there is little evidence that the Granger laws actually caused serious loss to the carriers. The Illinois law was not enforced until 1883. Even in Wisconsin, the state which is popularly supposed to have been most unfavorably affected by maximum rate regulation, the increase in net earnings between 1873 and 1874 was greater than ever . . . ." However, there seems to be a difference of opinion among writers concerning the effects of the Granger laws on railroad revenues; for the majority seem to believe that the

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Ibid., p. 470

laws did affect the railroads considerably, though their enforcement was lax. In fact Mr. Slason Thompson states that there was a decrease of 71%to 100% of a cent revenue per ton mile in the period between 1871-76, and operating revenue was reduced by $130,000,000. and brought about the numerous receiverships of the period between 1874-77.[29] The following chart, which is self explanatory, demonstrates quite well the magnitude of receiverships in the period between 1874-77[30].

Railroads in hands of Receivers

	Mileage	Capital Stock	Funded Debt
1874	6,825	$235,179,273	$236,285,961
1875	6,280	211,740,414	204,312,038
1876	3,692	87,181,928	114,783,799
1877	3,917	65,454,116	95,937,385
Total	20,714	$599,555,751	$651,319,183

Naturally one cannot attribute the poor financial condition of the R. R. in the period between 1874-77 solely to the passage of the Granger laws, for one must consider other factors such as: the extremely rapid growth of railroads mileage, the lack of sufficient business to make some of the roads profitable, the general corruption and inefficiency of railroad management of the period, and the general depression of agriculture and industry resulting from overproduction.

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[29] Thompson, S.: "A Short History of American Railways," p. 219

[30] Ibid: p. 219

The railroads vigorously opposed the Granger laws and tested the constitutionality of the laws in the courts. The United States Supreme Court in 1876 decided against the railroads, when it stated that public grain warehouses and common carriers were affected with public interest, and that the legislature had the authority to make regulations regarding their use (Munn Vs Illinois). In 1876 the Supreme Court, in the case of the Chicago, Burlington, and Quincy Railroad V. Iowa, ruled specifically that the railroads were subject to public control under the doctrine of Munn vs Illinois. In 1877 the Piek vs Chicago and North Western Railway Co. case demonstrated that the Supreme Court was willing to go further, when it permitted the states to regulate interstate commerce until Congress passed laws to regulate it. The states were permitted to regulate interstate commerce and railroad rates until 1886. In that year, the United States Suprem Court in the Wabash, St. Louis, and Pacific v. Illinois case, overruled the decision made by that body ten years previous. 31. The court did not deny that, under certain circumstances, state regulation might be applied to interstate commerce, when federal regulation was lacking. The court did state ~~did state~~ that the regulation of rates on interstate traffic must be considered exclusively within the control of the federal government. With this decision it became apparent that unless federal legislation was passed, which would supplement state regulations, many of the railroad activities would escape all legislative control, both state and federal. This condition of railway regulation furnished sufficient reason to warrant the passage of

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31. Daggett, S.R., " Principles of Inland Transportation," p. 48, case no. 118 U.S. 557, 1886

the Interstate Commerce Act of 1887.

Before discussing the provision of the Interstate Commerce Act of 1887, it seems advisable to sketch briefly the congressional discussions and investigations prior to 1887. According to Professor Raper, "No steps were, however, taken by the nation to regulate railway traffic until after 1870. There had in fact to this date been no demand for Federal, regulation and little demand for that by the states."[32] With the rise of state regulation in the early seventies, a senate committee headed by Senator Windom of Minnesota, began in 1872, an investigation of interstate traffic. This committee, reporting to congress in 1874, stated that cheaper transportation was needed, and made also several recommendations by which the lower rates might be brought about. The committee claimed that the only way competition could be assured was for the federal government or states to own one or more railroad lines. It, also, advised the development of inland waterways, the natural competitors of the railways. The committee also recommended that the carriers should be required to submit reports to the government, thus indicating the trend of the government's future relations with the railroads. The National House passed a bill in 1874, which advocated a reduction in rates; but it was not accepted by the Senate. In 1877 the Reagan Bill which provided for the prohibition of pooling and discrimination, and required the publication of rates, passed the House; but it failed to come to a vote in the Senate. It was not until 1884 that the Senate acted on the railroad problem. In that year,

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[32] Raper, C.E.: "Railway Transportation," .p.252

both the Senate and the House passed bills which established federal regulation of the railroads; but the inability to effect a compromise between the radical House and more conservative Senate delayed the passage of a bill establishing federal control, for several years. On March 21, 1885, a committee, composed of Senators Cullom of Illinois, Miller of New York, Platt of Connecticut, Gorman of Maryland, and Harris of Tennessee, was appointed to investigate and report on the feasability of regulating the railroads. According to Mr. Stickney, "The testimony taken, as well as the statements received in response to correspondence, was printed in a volume of more than 1,450 pages and may fairly be claimed to represent the best thought of the American people at that time, upon the questions involved in the regulation of commerce among the states."[33] The committee found that the complaints against the railroads were based upon many grounds. Some of the causes for complaint found by the Cullom Commission are as follows:

(a) local rates were unreasonably high compared with through rates

(b) both local and through rates were unreasonably high at non competing points

(c) rates were based not upon cost of service but upon what the traffic will bear

(d) that unjust discriminations were made against persons, articles of freight, certain companies, and against certain localities

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[33] Stickney, A. B.: "The Railway Problem", .p.123

(e) carriers engaged interstate traffic were able to avoid state regulations

(f) rebates and special concessions were given to certain favored shippers

(g) the cost of passenger service was very high because of the large munber of free passes, and

(h) that railroads often engage in other lines of business and undue favors are granted to those companies

The Committee, therefore, advocated the passage of legislation that would protect the public from discrimination. (It is to be noted that most of the charges made against the railroads are based upon discrimination of one sort or another.)

The Cullom report was particularly significant, for in that year the Supreme Court, in the Wabash, St. Louis and Pacific Railroad Company v. Illinois case, decided that the regulation of railroad rates on interstate freight must be regarded as exclusively within the field of federal authority. This decision definitely limited the states' control to interstate traffic, and freed the railroads from state control of interstate traffic. Congress was forced by the pressure of public opinion to act on federal regulation of the railroads. The Senate and the House adjusted their differences and the Act to regulate commerce became a law on February 4, 1887. Naturally the Cullom report, having been completed in 1886, many of its recommendations were embodied in the Act of 1887.

Chapter Four

The Interstate Commerce Act, its Interpretation, and the Consolidations

The act of 1887 contained twenty-four sections, but because of the length, it seems advisable to describe only its leading provisions.

Section One of the act states that the act shall apply to any common carrier engaged in transporting passengers or property wholly by railroad or partly by rail and partly by water in interstate or international commerce. The provisions of the act did not apply to carriers operating within one state, or carriers that operated solely by water. This section also stated that all charges for service rendered in the transportation of passengers or property should be reasonable and just; and unjust charges were prohibited and declared unlawful.

Section Two declared it unlawful for any common carrier, directly or indirectly, by any special rate, rebate, drawback, or any other device to charge any person more or less money for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar condtions.

Section Three forbade undue preference. It declared to be unlawful for a common carrier to give undue or unreasonable preference to any person, company, firm, corporation, locality, or description of traffic, in any respect whatsoever. This section also required every common carrier to afford proper and equal facilities for the interchange of traffic between their respective lines, and forbade discrimination in rates between such connecting lines.

Section Four made it unlawful for a carrier to charge more in the aggregate for the transportation of passengers

or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. However, the Commission was allowed after investigation to permit in special cases the carrier to charge more for a short haul than a long one.

Section Five made it unlawful for a carrier to enter into any contract, agreement, or combination for the pooling of freights of different and competing railroads, or to divide between them the net earnings of such railroads.

Section Six required every carrier to print schedules showing its rates and fares, and to keep them available for public inspection at every depot or station on its line. No advance might be made in published rates except after ten days' notice. Reductions might be made without previous notice, but whenever a reduction was made, the public was to be notified immediately, copies of published rates must be posted with the Interstate Commerce Commission, and carriers were not permitted to charge more or less than these rates.

Section Seven forbade any carrier to enter into any combination, contract, or agreement to prevent by change of time or schedule or other device the carriage of freights from being continuous from the place of shipment to the place of destination.

Section Eight states that if a carrier should violate any of the provisions of the act, the carrier will be liable to the injured person for the full amount of the damages sustained along with attorney's fee for the plaintiff.

Section Nine states that persons damaged by acts of the carriers in violation of the Act may complain to the commission or sue in any district or circuit court in the United States; but both methods cannot be used. The court may compel the testimony of directors and any other officials of the railroad.

Section Ten provided that a fine not exceeding $5,000 should be imposed for each violation of the law.

Section Eleven created the Interstate Commerce Commission, which was to be composed of five members, who shall be appointed by the President with the consent of the Senate. Not more than three of the commissioners might be from the same political party. No person in the employ of any common carrier, or pecuniarily interested therein, by stock ownership or otherwise, was eligible for appointment. The commissioners could not engage in any other business or employment.

Section Twelve gave the Commission authority to inquire into the management of common carriers. The commission was granted the authority to obtain from the carriers the information needed to perform its duties as outlined in the Act. To accomplish its ends the Commission was empowered to require testimony of witnesses and the production of all books papers, contracts, and agreements that relate to the investigation.

Section Thirteen provided that if any complaint was made to the Commission stating that a carrier had violated the Act, the Commission should foward a statement of the charges to the carrier, and unless the carrier gave satisfaction to the complainant, the Commission should make whatever investigation it deemed necessary.

Section Fourteen provided that the Commission make written

reports of their investigation, including in them findings of facts together with recommendation of reparations, if any , to be made.

Section Fifteen states that if the Commission, after investigation, is satisfied that the law has been violated, it shall serve notice upon the violating carrier to desist from such acts or to make reparation for the injury done.

Section Sixteen states that if a carrier refuses to observe an order of the Commission, that the latter shall petition in Federal Courts for a writ to compel the carrier to obey.

Section Seventeen, Eighteen, and Nineteen contain minor provisions concerning the procedure, salary, and offices of the Commission.

Section Twenty states that the Commission is required to compel the carriers to give annual detailed reports containing information as to finance, equipment, revenues, expenses, both operating and non-operating, and an annual balance sheet to be made accoring to forms prescribed by the Commission.

The remaining Sections of the Act deal with miscellaneous matters that do not require mention here.

In 1889 amendments were made to several sections of the Act. The Sixth Section was amended so as to more specifically regulate the posting of rates, and to require that rates could not be reduced, except after three days' notice. Section Ten was amended so as to provide further punishment for violators of the Act, by stating that in addition to the fine of not more than $5,000. for each offense, that the violators will be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the

discretion of the court. Section Twelve was amended so as to provide that the Commission can invoke the aid of any court of the United States in requiring attendance and testimony of witnesses, and the production of books, papers, and documents. The claim that such testimony may tend to imcriminate the person giving it shall not excuse such witnesses from testifying; but such evidence will not be used against him. Sections Fourteen, Fifteen, Twenty-one, and Twenty-Two were also amended; but the important amendments are stated above.

On February 11, 1893 Congress passed a law which limited immunity to natural persons who give testimony under subpoena and under oath.

The Interstate Commerce Commission was organized on March 30, 1887, and it immediately commenced the discharge of its duties as designated in the Act of 1887. Professor Jones, states, "It (the Commission) found its task lightened during the early years of its administration by the fact that the railroads generally endeavored to comply with the provisions of the law and with the orders of the commission. As a result many discriminations were eliminated, railway tariffs were revised and simplified; a greater degree of uniformity in classification was secured; pools were dissolved or reorganized..."[34]. However, this satisfactory condition of affairs did not continue very long, lasting only three years.

The United States Supreme Court was the first body to seriously limit the power of the Commission and impede its

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[34] Jones, E.: "Principles of Railway Transportation," .p. 221

progress in regulating the railroads. The Commission was hampered, because, under the Act, its orders became effective only after affirmative action by the Federal Courts. The usual procedure before the Commission was first the filing of a formal complaint, secondly, a hearing before the Commission, and then finally an order issued by that body. Naturally in many cases, especially in the more complex ones, this procedure is not completed until many months have elapsed. Even after the order has been issued by the Commission, it is not binding upon the carriers until a judicial writ has been granted by Federal Courts. After a writ has been granted by the Federal Court, appeals may be taken by the carriers from one court to another until many years have passed before a final decision is reached. Professor Miller states, "Indeed the average duration of cases carried through the courts was not less than three years and, in certain instances, as much as nine years have elapsed before the final word is spoken."[35] This delay in settling railroad complaints has been caused mainly by the failure of the Supreme Court to grant priority to railroad cases. This delay has been advantageous to the railroads because decrees forcing them to desist from illegal practices are not binding until a final decision has been rendered by the courts.

The Commission's power was limited considerably by the decision of the U.S. Supreme Court in 1888, in the Kentucky and Indiana Bridge case.[36] In this case the court treated the

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[35] Miller, S.L.: "Railway Transportation, Principles and Point of View", p. 743

[36] Ripley, W. Z.: "Railroad Rates and Regulation," New York, 1922 p. 461 f case No. 37 Federal Reporter 567

appeal as an original proceeding, and thus it was similar to a new case. This policy, unfortunately, tended to make the action and investigation before the Commission a mere preliminary to a final contest in the courts. Such a policy necessarily involved considerable duplication of expense, and also tended to nullify the activities of the Commission because both the complainant and the carrier, realizing that it was unnecessary to fully present the case before the Commission, did not present the complete evidence in the case before the commission. As a result of this, many of the Commission's findings were based upon a partial statement of the bare facts of the case. Under these circumstances, it is only natural that many orders that had been issued by the Commission were later reversed by the courts, when all the facts in the case were presented.

The first real test of the Commission's power was the refusal by railroad officials and shippers to answer leading questions in testifying before the Commission. The first test of the commission's authority to compel testimony was in the Counselman case in 1890. Mr. Counselman, a shipper, when testifying before a grand jury investigating alleged violations of the Acts of 1887 and 1889, refused to state whether or not he had secured lower than the published rates on grain in the previous year. He asserted that the Fifth Amendment to the to the United States Constitution afforded him protection against being compelled to testify. The Amendment, states, "No person------shall be comepelled in any criminal case to be a witness against himself." The witness also refused to testify before a district court and the case was appealed to the Circuit Court, which decided in favor of the Commission.

However, Counselman appealed to the United States Supreme Court. This tribunal decided in 1892, that the Revised Statutes of the United States, which had been evoked for twenty-five years to protect the constitutional rights of witnesses when called upon to testify, against criminal action based upon that evidence, did not give adequate protection to the witness. The court stated that the law should give absolute immunity to the witness, and ordered that Counselman be discharged from the custody of the United States Marshal. Congress passed a law in 1893 which granted immunity to witnesses, but there was an appeal against that law before the Supreme Court in 1896. In this decision (Brown v Walker), however, the court denied the right of witnesses to withhold testimony. The Commission was then, after a six years struggle, finally able to compel witnesses to testify in the commission's investigations.

Section Five of the Interstate Commerce Act, which forbade pooling, naturally, banned both the money and traffic pools as they existed in 1887.[37] As a result of this Act, the Southern Railway and Steamship Association,[38] one of the most successful of all the pools, and many other pools were obliged to disband. However, after the passage of the Act of 1887, many of the traffic associations were reorganized so as to comply with the provisions of the law; but continued to restrain competition in their respective territories by fixing or maintaining rates. The

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[37] The traffic pool, the less successful of the two, involved the assignment of a definite percentage of competitive tonnage to each of the rival carriers through the maintenance of the agreement. The money pool represented a contract under which each carrier was permitted to handle all the competitive traffic it could secure; but it was required to deposit for later distribution a certain portion of all receipts from competitve freight and traffic business.

[38] For an excellent description of the activities of this Association see Ripley, W.Z.: "Railway Problems," p.p. 128-152

carriers believed that these associations were not forbidden by law, since they did not divide up their traffic as earnings.

The Trans-Missouri Freight Association was formed in 1889 with the avowed purpose of establishing and maintaining reasonable rates and regulations within the territory South and West of the Missouri River. A committee was established to determine rates and rules. Monthly meetings were held to consider all matters of interest, and fines were levied for failure to attend meetings or violations of the rules, except those made in good faith against non members of the association. The railroads of that district claimed that the association was absolutely necessary to prevent ruinous competition, and any member could make changes in rates if it brought the matter before the association previous to enacting them.

The Federal Government filed a suit on January 6, 1892, claiming the Trans-Missouri Traffic Association operated in violation of the Sherman Antitrust Act.[39] This Act states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States or with foreign nations, is hereby declared to be illegal.. Every person engaged in any such contract, combination, or conspiracy, shall be guilty of a misdemeanor, and is subject to a fine of not greater than five thousand dollars or imprisonment not exeeding one year or both in discretion of the court. The Circuit Courts of the United States were invested with the jurisdiction to prevent

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[39] Seager, H. R. and Gulick, C. A.: "Trust and Corporation Problems," p. 370ff for 9 sections of the Act.

violations of the Act. Before the case reached the Supreme Court in Nov. 1892 the Association was dissolved; but a temporary agreement was reached by most of the members of the association, which effectively continued the arrangement for some time.[40] The Supreme Court decided that this voluntary dissolution was not complete, and refused to allow the case against the association to be dropped. The Supreme Court decided in 1897 (166 U.S. 312) by a 5 to 4 vote that the Act included every contract and combination in restraint of trade, and that the Act applied to the railroads. This decision stated that both reasonable and unreasonable agreements in restraint of trade violated the Act. Thus the Trans-Missouri Traffic Association was ordered to disband.

In 1898 the Supreme Court passed upon the Joint Traffic Association, a case in which the facts were similar to those of the Trans-Missouri Traffic Association case. The court held that the agreement of the Association prevented and intended to prevent, not only secret competition but any competition, and that the rates agreed upon by the Association were higher than those that occur where competition existed. Thus this Association was, likewise, ordered to disband.

These two decisions brought about a reorganization of the traffic associations, but not their abandonment. Railroad officials still met to discuss matters of mutual interest such as the classification of freight, the making of joint rates, and the speed of passenger trains. These meetings gave the railroads sufficient opportunity for co-operation, and them seem to have

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[40] Ibid: p.p. 378-383

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[40] Ibid: p.p. 278-333

taken advantage of them fully. In the opinion of impartial observers, the decisions of the Supreme Court on the traffic associations, had no serious effect upon the railroad's operations. In fact secret associations existed in many cases with the same general effect as before the decisions. The refusal of the railroads to accept the decisions of the courts on traffic associations seems to indicate that the railroads were aware of the positive disadvantages of excessive competition and unregulated rates and that they would strive to protect their interests despite the attitude of the Commission. In 1901 the Commission, admitted that it was difficult to see how our interstate railways could be operated with due regard to the shipper and the railway, without concerted action of the kind afforded through these associations. This statement by the commission would seem to indicate that in the future the Commission would be more tolerant toward traffic associations.

Closely allied to the problem of traffic associations isthe problem of personal discrimination Professor Parsons states, "The purpose of discrimination may be (1) to keep business from... a competing line; (2) increase revenue by creating new business... rates may be very low, as anything above the cost of handling the new business will add to the income; (3) to simplify and solidify traffic; (4) to favor persons who through political influence or any other power may aid or injure the road; (5) to advance the interest...of a business or property in which the railroads' officials or their friends are interested; (6) to injure a business or a person that has incurred the enmity of the railroads

or their allies."[41] One needs only to read the story of the Standard Oil rebates to secure an idea of the importance of rebates in the era before 1900.[42]

The Cullom report in 1886 particularly stressed the need of regulation of personal discrimination. Section Five of the Interstate Commerce Act of 1887 expressly forbade the granting of rebates; and the amendment of the act in 1889 provided for severe penalties for violations of the act. Despite these various prohibitions of rebates and the presence of adverse public opinion, the practice of granting rebates did not cease. In fact the volume of rebates increased rather than decreased, and the only effect of the act was to change considerably the type of rebates granted. The Act of 1889 made the granting of cash rebates quite risky because of the difficulty of covering up the sum given in the accounts of the company. In place of the cash rebates, the railroads adopted numerous other forms of discrimination, in most cases equally illegal, but far easier to conceal. One of the effective means of disguising is underclassification. Normally silk is charged a much higher rate than cotton cloth; but the shipper, acting in with the railroad's agents, may have a box of silk classified as cotton cloth soas to enjoy the low rate on the latter. In 1898 the westbound inspection bureau of the trunk lines from Boston, New York, and Philadelphia discovered 270,000 misrepresentation by

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[41] Parsons, F., " The Heart of the Railrod Problem, " p. 23

[42] For a brief account of the Standard Oil rebates, see Ripley, W.Z., " Railway Problems," pp. 92- 107
Seager, H.R., and Gulick, C. A., " Trust and Corporation Problems," pp. 96- 124

shippers of the contents of the packages offered to the railroads for transportation. Nearly every one of these cases was an intentional attempt to defraud the railroads. Naturally if it is possible to underclassify goods without the consent of the railroads, how easy it should be to grant rebates of this sort if the railroads consent. Professor Parsons states, "On the Yazoo and Mississippi Railroad and the Illinois Central, one horse can be carried 667 miles for $36. and four horses for $99. while twenty-five horses can make the trip together for $100. The first horse is billed at 2,000 pounds no matter what he really weighs; the second is billed at 1,500 pounds; and each additional animal counts 1,000 pounds."[43]. Iron and coal cost less to transport per ton-mile yet rates from Pittsburg to New York City were for many years two to five times the grain rate from New York to Chicago.

False billing was a very common method of granting rebates, and was very difficult to detect, if the railroads approved. According to testimony before the Commission in 1908 by the Boston and Albany agent in East Boston, the Standard Oil's tank cars, which weigh from 35,000 to 50,000 pounds, were ordinarily billed at 24,000 pounds.

Midnight tariffs were also an effective means of granting rebates. Special shippers were notified that a certain low rate would be effective on a certain date, and the shippers would have a large shipment ready for the specified date. The reduction

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[43] Parsons, F.: "The Heart of the Railroad Problem," .p. 74

in rates was filed as required with the Interstate Commerce Commission, and the necessary public notice given. The new rate could be used by any shipper who noted it; but because of the large number of tariff changes made monthly, it would be quite unlikely that any shippers but those who were notified previously, would notice the change. The new rate would remain only a short time, because the carriers immediately would petition to restore the original rate as soon as the law would permit.

Excessive payments for use of private cars was another method of granting rebates. Though the rental based on mileage may be proper there is certainly the possibility of abuse. If the payment to the car owner is excessive, the result is the same as a rebate. Rebates of this sort have been paid to the Standard Oil, the meat packers, and others. The meat packers alone exacted many millions of dollars yearly by means of excessive rents on private cars.

Excessive payments for supplies is another way of granting rebates. Railroads desirous of granting rebates can pay more than the market value for their supplies. Practically all the lubricating oil used by the carriers was purchased from the Standard Oil, the price paid varied according to the degree of dependence of the railroad upon the trust. The only reason for this uneconomical buying appeared to be the huge volume of traffic available for distribution by the Standard Oil.

Naturally while there were many other types of personal discrimination, those mentioned were the most important methods of evading the law. But lest we might convey the impression that there were relatively few means of evading the law concerning rebates, Professor Parsons lists over sixty different forms of

discrimination that were in effect in 1906, many being used constantly and others only as the occasion demanded.[44] In fact the numerous methods of evading the regulations were so varied and ingenious that Professor Miller states "Surely no more positive evidence of the ingenuity of the human mind is discoverable than appears in the success of the railroads and certain shippers in violating the spirit of the law which prohibited discriminations and yet avoiding the consequences of that violation."[45]

The magnitude of the innumerable concessions made by the railways to shippers cannot be estimated, because of the extent to which those favors have been buried beyond all hope of discovery except through a very careful examination of their accounts. Despite the obscuring faction which prevent accurate estimates of the magnitude of railroad rebates Professor Parsons ventures to state "In 1888 the losses of the roads through discrimination were more than $100,000,000 a year, when the total income of the railroads was $800,000,000. The losses in 1900, when the income was $2,000,000,000 yearly, must have been at least $200,000,000."[46]

As the years passed by the public became aware of the dangers inherent in practice of granting rebates, and there was an ever increasing clamor for adequate regulation of the railways. The railroads were not in this instance opposed to legislation, because

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[44] Ibid p.p. 228-232

[45] Miller, S. L.: "Railway Transportation, Principles and Point of View," p.p. 760

[46] Parsons, F.: "The Heart of the Railway Problem," p.235

they had discovered that they were suffering heavy losses in revenue through the granting of rebates. As a result of the lack of opposition from the railroads, the legislation was passed without opposition, and with very little debate. Thus on February 19, 1903, Congress passed the Elkins Act designed primarily to prevent discrimination.

The provision of the Elkins Act may be summarized under five provisions. First the Act provided that whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts anendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be deemed to be the legal rate, and any departure from that rate, or any offer to depart from it shall be considered to be an offense. This provision removed an old difficulty arising from the Act of 1889, by which it was necessary to prove that any departure from the published rate was actually accompanied by discrimination between shippers. Under this section of the Act of 1903, any departure from the published rate was conclusive evidence of discrimination.

Another important provision of the Act state that fines provided for in this law could be assessed against the offending railroad corporations, as well as against their officers and employees; and that the corporation was made liable for any acts which, if committed by its officers or employeess would render the latter guilty of a misdemeanor. Personal liability of corporation servants was retained.

The third provision states that to offer, grant, or give, or to solicit , accept, or receive any rebate, concession, or

discrimination in respect to the transporting, of property, whereby the said property shall be transported at a lower rate than the published tariffs filed by the carrier, is made an offense, and is punishable by fine. This provision made it as unlawful to accept a rebate as to give it, and was thus a decided improvement over the law of 1889, which made the carrier alone liable.

The fourth provision stated that the penalty of imprisonment for a violation of the law of 1889 was repealed in all cases. This provision was inserted, because it was thought that testimony would not send the parties involved to prison. However, the maximum fine was raised to $20,000, a sum four times as large as the fine provided in the Act of 1889.

The fifth provisions stated that whenever the Commission had reasonable grounds for believing that any carrier was engaged in transporting freight or passengers at less than the published rate, as in any other type of discrimination forbidden by law, it might present a petition stating the facts to a circuit court. The court was required to investigate the claims of the Commission; and if the court found that the circumstances mentioned in the petition were true, it could enforce an observance of the published tariffs, or require the discontinuance of the discrimination. Court orders could be enforceable against the shippers as well as the carriers. The district attorneys of the United States, when directed either by the Attorney General or the Commission, were required to prosecute such cases. The new law also allowed suits to be prosecuted in any court of the United States having jurisdiction of crimes within the district through which the transportation in question might have passed, as well as in the district in which the violation of the law took peace.

During the first few years after the passage of the Elkins Act, very little was done to enforce its provisions. After 1905 many prosecutions were attempted, and the results were highly satisfactory from the standpoint of the Commission. So many convictions were secured that personal discrimination on a large scale was discouraged. The government collected over $600,000 in fines in a period of eighteen months from the Standard Oil, while about $390,000 was secured from the "Beef Trust" and the "Sugar Trust". During the years that followed the passage of the Act, the government reduced personal discrimination to rather small proportions, though discrimination very carefully disguised still remained for many years, and has as yet not been totally eliminated.

Another important reversal of the Commission, as it attempted to apply the Act of 1887 was caused by the commission's endeavor to eliminate discrimination between domestic traffic and export and import traffic. The endeavors of different ports and of the railroads serving them to secure either import or export traffic, or both, have obliged the railroads, at nearly all times, to make inland rates on certain traffic far lower than on similar traffic between the same points that is entirely domestic. The railroads also stated that they have been forced to rapidly change their rates in accordance with the fluctuations of steamship rates, which often rise and fall from day to day as the offerings for cargoes are heavy or light. In some instances the rate from a foreign port to its destination in the United States was much less than from the port in this country to its inland destinations. The commission attempted to prevent this discrimination against domestic traffic and prevent also the rapid fluctuations in rates

that the railroads deemed necesssary to stimulate import or export traffic. The commission in order to enforce its opinion brought suit against the Texas and Pacific Railway Company. This railroad with its connections transported merchandise from Liverpool, England, to San Francisco, Cal. The merchandise was carried by water from Liverpool to New Orleans and by rail from New Orleans to San Francisco. The rates on one type of merchandise was $1.07 over hundred pounds from Liverpool via New Orleans to San Francisco but the domestic rate from New Orleans to San Francisco on goods of similar characters $2.88 per hundred pounds. The defendants justified this rate because the water competition between the various routes from Liverpool to San Francisco, compelled the railroads to charge low rates, if they wished to obtain any of the traffic.

The Supreme Court, upon appeal by the carrier, reversed the decision of the commission, holding that in the case of imported traffic as well as domestic traffic the commission should consider all conditions, whether at home or abroad which affected the reasonableness of the rate adjustment. The court held that the Act of 1887 contained no specific regulation that stated imported goods should be carried inland at the same rate as domestic goods. The carriers, also, were not prohibited by the Act from participating in a through rate from a foreign port to an interior point, of which the division received by the inland carrier was less than a similar service in transporting domestic merchandize between the identical points. This decision must also apply to export traffic, and thus there is nothing to prevent a railroad from making through rates from a point in the United States to a foreign point on which the carrier will receive less than the sum that the railroads deemed necessary to eliminate import or export traffic. The Commission in order to enforce its point of view brought suit against the Texas and Pacific Railway Company. This railroad with its connections transported merchandise from Liverpool, England, to San Francisco, Cal. The merchandise was carried by water from Liverpool to New Orleans and by rail from New Orleans to San Francisco. The rates on one type of merchandise was $1.07 per hundred pounds from Liverpool via New Orleans to San Francisco but the domestic rate from New Orleans to San Francisco on goods of similar character was $3.70 per hundred pounds. The defendants justified this rate because the water competition between the various routes from Liverpool to San Francisco, compelled the railroads to charge low rates, if they wished to obtain any of the traffic.

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The right of judicial review of the reasonableness of railway rates fixed by state legislatures or Commissions was definitely settled in the case of the Chicago, Milwaukee, and ST. Paul Railway Company v. Minnesota, decided by the Supreme Court of the United States in 1890. Minnesota had a statute which allowed a state commission to set or fix railway rates. Working under the provisions of this law, the state commission reduced the rate on milk between certain points from three cents to two and one half cents per gallon.[47] The Minnesota courts refused to consider the evidence presented by the carrier, on the grounds that under the law the Commission's findings were conclusive. The carrier appealed the case to the Supreme Court, claiming that the denial of a hearing before the courts of Minnesota concerning the reasonableness of rates was equivalent to depriving the carrier of property without due process of law. The Supreme Court stated, " The question of the reasonableness of a rate of charge for transportation by a railroad company, involves, as it does, the element of reasonableness, both as regards the company and as regards the public. It is eminently a question for judicial investigation, requiring due process of law for its determination. If the company

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[47] Ripley, W.Z., " Railway Problems" p. 604

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[47] Ripley, W.Z., " Railway Problems" p. [illegible]

is deprived of the power of charging reasonable rates for the use of its property, and......in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect, of the property itself, without due process of law, and is in violation of the Constitution of the United States." Three of the justices of the court vigorously protested the decision on the ground that it overruled the decision given in the Munn v Illinois case. This decision overruled the Granger cases. The legislatures were still allowed to regulate; but the final arbiter of the reasonableness of railroad rates was to be the courts in the future, and not the legislatures. This decision led to a great reduction in state powers, and since 1889 suits to set aside rates made by legislatures have multiplied, and the decisions have tended to bring about ever increasing limitations of state powers.

In 1892 in the Chicago and Grand Trunk Railway v. Wellman case, the court upheld the Michigan law which regulated rates. In this decision the court stated that the legislature had the power to regulate rates, and that judicial intervention is to be employed only as a protection against unreasonable rates. The court further stated that the court, before it would be able to decide whether specific rates were unreasonable and prevented proper returns on the investments in the carrier, should be fully acquainted with the disposition of the receipts of the company, for under those conditions it might appear that, if the carrier had prudent management, it could, with the rate state, pay interest on bonds and permit reasonable dividends to the stockholders. This decision affirmed the power of the court to review the reasonableness of rates fixed by legislatures.

In the Reagan v. Farmers' Loan and Trust Company, decided in 1894, the doctrine of judicial review was again stated and further elaborated. This case is particularly significant because it is the first in which rates fixed by a state Commission were enjoined by the Supreme Court. The court stated that there was no doubt that the states had the authoritiy to establish commissions to regulate rates and fares. Yet it has been always recognized that, if a carrier attempted to charge a shipper an unreasonable rate, the court had jurisdiction to investigate the rate, and award the shipper any amount taken from him in excess of a reasonable rate. The court is not permitted to revise or change rates that have been set by a legislature or Commission; but the court has the right to determine whether the rates set by the legislature or Commission are unjust or unreasonable, and are of a sort that will cause a destruction of the rights of the property, and, if found so, to restrict their use. The court deciding on the reasonableness of the rates set by the Texas commission, found that they were unreasonable. Concerning this case Professor Ripley states "In the Reagan cases is laid down the doctrine that the failure of rates to yield profitable compensation is not conclusive of reasonableness when, inter alia the railroad has indulged in unjust discriminations resulting in general loss. And as yet, as has been seen, the court employed a method of determining the effect of new rates, which enables a railroad to take refuge under the very shelter of its own discrimination and....protected by the strong bulwark of the law, to defy legislatures and commissions."[48] It is to be noted here that

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[48] Ripley, W. Z.: "Railway Problems," p. 637

this decision which stripped the state legislatures and commission of their power as final arbiter of the reasonableness of rates had many disadvantages, such as, (a) the court might not take all the facts unto consideration in determining the justness of rates, thus allowing poorly managed roads to earn their interest and dividends through higher rates, (b) the carriers would naturally protect all rates by legislatures or commissions if they thought it possible to hage their decision set aside by the courts, (c) the courts would be required to investigate endless rate cases, thereby taking up much of the court's time, (d) though the courts might serve to protect the railroads from unjust discrimination and ruinous rates, we have no assurance that the courts would be better qualified to pass on questions of rates than the Commissions themselves. It is to be especially noted here that the Supreme Court definitely asserted its right to review the reasonableness of rates, and that the Supreme Court was thereafter to assume more authority over rate regulation than less.

However, there was some doubt as to whether the decision in the Reagan v. Farmers' Loan and Trust Company case applied to the Interstate Commerce Commission. For nearly ten years both the commission and the carriers had thought the Act of 1887 conferred rate-making power. It appears rather odd that the first objection to the Commission's rate-making power should come from the courts and not from the railroads. In the so called Social Circle Case[49] which involved the reasonableness of rates

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[49] "Cincinnati, New Orleans and Texas Pacific Railway Company v. Interstate Commerce Commission", 162 U. S. 184

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to Social Circle, Georgia, but was primarily concerned with the application of the Long-and Short-Haul clause, the commission had ordered that the rates should be lowered. The Supreme Court not only stated that there was some doubt concerning the Commission's power to set rates, but also asserted that it did not find any provision in the Interstate Commerce Act that expressly or by inference, conferred upon the Commission the power to fix rates. The court also expressed its disapproval of the railroad's practice of withholding testimony from the commission. Thus there was sufficient inducement to the carrier to present its case as completely as possible before the Commission, for the decision of the commission would be binding upon the carrier unless set aside by the Federal Courts. But the most important section of the decision as far as rates are concerned, is the statement of the Supreme Court that the Interstate Commerce Act apparently did not confer upon the commission the right to fix rates, but to determine their reasonableness.

Naturally after the decision in the Social Circle case was handed down, the carriers immediately challenged the rate-making power of the commission. Certain lower court decisions denied the authority of the Commission to fix rates; but the final decision was made by the Supreme Court in 1897 in the Cincinnati Freight Bureau case.[50] The Commission asserted in its complaint that the freight rates from the Eastern Seaboard and Central West to the South unjustly discriminated against Merchants and manufacturers in the Central West, and favored business interests of the Eastern Seaboard. The complaint specifically stated that the

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[50] For a rather complete history of this case, see Ripley, W. Z.: "Railway Problems," p. 153-200 Case No. 1 C C. v. Cincinnati, New Orleans and Texas Pacific Railway Company 167 U.S. 479

railroads leading from the Ohio River into the Southeast did not grant as low freight rates per ton mile to certain of the southern cities as were granted by railroads extending thereto from New York, Philadelphia, Baltimore, and Richmond. The railroads protested that the rates from the eastern cities to the South were low because of the presence of water competition, and that if the rates on these seaboard lines were advanced, far more of the carriers' traffic would be carried by water. If the rates from the Ohio River to the Southeast were reduced, the revenue derived from these lines would be inadequate to properly maintain and build up their properties. The Supreme Court reversed the decision of the Commission,namely,that the rates from the central West to the Southeast should be reduced. The court presented the following considerations: First, the power to prescribe rates for carriage by a common carrier is a legislative and not an administrative or judicial function and, having respect to the large amount of property invested in the roads, the varying and adverse conditions attaching to such carriage are a matter of supreme delicacy and importance. Second, there is nothing in the Act of 1887 that specifically grants the Commission the power to fix rates,and if the legislative history of the day were examined carefully, it would be apparent that there was no serious thought of doing so. Third, incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable does not imply that the Commission has the power to prescribe rates for the future even though the Commission was directed to carry out the provisions of the act. Fourth,the court pointed out that in section six of the act it recognized the right of the carrier to establish rates,and to increase or reduce them, and which

required the carrier only to publish its rates and file them with the Commission.. Thus the Supreme Court ordered the complaint of the commission to be dismissed on the ground that the Commission had no authority to establish a rate for the future.

This decision, as can be readily seen , stripped the Commission of much of its power, and severely limited its power of effective action. The power of the Commission in passing upon the question of the reasonableness of rates was limited solely to determining whether a certain rate was reasonable or not. After the rate had been established, If the court agreed with the decision of the Commission that a specific rate was unreasonable, the carrier could agree to a very slight reduction in rates, and thereby comply with the court's decision. Despite this slight reduction in rates, the tariff might still be unreasonable. If the Commission considered this new rate also unreasonable, it could carry the question to the courts. If the courts decided in favor of the Commission, the carrier could again comply with the court decision by reducing the rate very slightly. Thus it is quite evident, that if the carriers desired to prevent unreasonable rates, the Commission would be unable to force them to adopt reasonable tariffs. As a result of this decision, the commission was virtually deprived of all its control of railroad rates and tariffs. Though shippers, who had been obliged to pay unreasonable rates, still were permitted to sue the carriers for the difference between the reasonable and unreasonable rates, very few shippers sued the carriers because the damages incurred in many cases were too small, and even though damages were considerable the shipper did not wish to antagonize the carriers, for the latter can by various means cause large losses to the shippers. One of the main effects

of this decision of the Supreme Court in the Cincinnati Freight Bureau case was that it demonstrated to congress and the public that further legislation was imperative.

The Commission still was under the impression that it was permitted to regulate rates through section four of the Act of 1887, namely, through the provision that prohibited a lower rate for a long haul than a short haul under substantially similar circumstances and conditions also forbade a lower rate for a long haul when the traffic originated in some other country. The question of the application of section four to export and import traffic has been already discussed under the Import Rate case (1896). The next important test of section four of the Act came when the Commission attempted to apply its provisions to strictly domestic traffic. The decision on this point came in the famous Supreme Court decision in the case of the Interstate Commerce Commission v Alabama Midland Railway Company, decided in November, 1897. The Commission, presenting its arguments, stated that Troy, Alabama was unjustly discriminated against, and cited that the Alabama Midland charged a higher rate on phosphate rock to Troy, Alabama than to Montgomery, Alabama, though the former was an intermediary point about fifty-two miles nearer the source of the phosphate than Montgomery. Shipments made from Charleston and Port Royal, South Carolina, and from Gainesville and other points in Florida are sent to Troy and then to Montgomery. The following tables are taken from Professor Ripley,[50] indicate quite clearly the extent and

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[50] Ripely, W.Z.: "Railway Problems," p. 360

type of discriminations against Troy. The following figures represent rates in cents per ton on phosphate rock:

To	From Port Royal	From Charleston	From Gainesville
Troy	322	322	322
Montgomery	300	300	300

The following figures represent the rates on cotton per hundred pounds from Troy and Montgomery respectively the following ports:

From	To Brunswick	To Savanah	To Charleston	To West Point	To Norfolk
Troy	47	47	52		
Montgomery	45	45	45	51	51

It may be seen from the above that the discrimination against Troy were quite considerable in most cases, and were of such importance as to further the development of Montgomery at the expense of Troy. The Commission naturally appreciated the fact that Montgomery was connected by an active steamship line with Mobile, and that the carriers would be obliged to meet the rates of water competition; but it (the Commission) thought that the above were not sufficient cause to justify a higher rate for a shorter distance. However, the main complaint of Troy was that in this system of making export rates special benefits are given by the carriers of the Southern Railway and Steamship Association to Montgomery and other localities on their lines, while they were denied to Troy, and that this constituted unjust discrimination against Troy. The carriers did not claim that there were special costs of service in transporting goods to Troy that would justify the disproportionate rates charged to that city, but based their defense on another district ground, namely,

dissimilarity of circumstances and conditions resulting from water and rail competition at Montgomery. The Commission ordered the carriers to cease the discrimination against Troy. The railroads appealed the Commission's orders to the courts. The Circuit Court stated that "The conditions were not substantially the same, and that the circumstances are dissimilar, so that the case is not within the statute. New testimony was taken and the conclusion reached is that the bill is not sustained; that it should be dismissed." The Circuit Court of Appeals affirmed the decree of the Circuit Court, and cited the rise of Montgomery, the number of railroads, entering it, and especially the presence of water competition. The Supreme Court in 1897 overruled the Commission and stated that competition, including the competition of railways and trade centers, must be taken into consideration in determining whether or not conditions at the nearer and farther point are similar. The court did not state that competition itself necessarily relieved the carriers from the restraints of the long and short have clause, but that competition should not be forgotten in determining what constitutes dissimilar circumstances and conditions. The Commission, however, interpreted the court's decision to mean that if the carriers could prove that conditions at near and distant points are dissimilar, the railroads would be permitted to violate the long and short haul clause at will. The carriers naturally asserted that the court's decision legalized all departures from the long and short haul clause.

The Commission, however, attempted to save some of the powers conferred upon it under section four of the Act of 1887, dissimilarity of circumstances and conditions resulting from water and rail competition at Montgomery. The Commission ordered the carriers to cease the discrimination against them. The railroads appealed the Commission's orders to the courts. The Circuit Court stated that "The conditions were not substantially the same, and that the circumstances are dissimilar, so that the case is not within the statute. Much testimony was taken and the conclusion reached is that the bill is not sustained; that it should be dismissed." The Circuit Court of Appeals affirmed the decree of the Circuit Court, and cited the size of Montgomery, the number of railroads entering it, and especially the presence of water competition. The Supreme Court in 1897 overruled the Commission and stated that competition, including the competition of railways and trade centers, must be taken into consideration in determining whether or not conditions at the nearer and farther point are similar. The court did not state that competition itself necessarily relieved the carriers from the restraints of the long and short haul clause, but that competition should not be forgotten in determining what constitutes dissimilar circumstances and conditions. The Commission, however, interpreted the court's decision to mean that if the carriers could prove that conditions at near and distant points are dissimilar, the railroads would be permitted to violate the long and short haul clause at will. The carriers naturally asserted that the court's decision legalized all departures from the long and short haul clause.

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and instituted proceedings in the courts in the Chattanooga case against the Louisville and Nashville Railroad. In this case the Commission stated that there was conclusive evidence that the carrier had unjustly discriminated against Chattanooga and favored Nashville. To be more specific Chattanooga had a higher rate on goods from New York than Nashville, although the goods destined for Nashville passed through Chattanooga, and were hauled one hundred and fifty-one miles further. The Commission in this case particularly noted that water competition was only of minor importance, because very few products were hauled on the Cumberland river at that point. Both the lower courts, that is the Circuit Court and the Circuit Court of Appeals, sustained the Commission; but the Supreme Court overruled the decision of the Commission and the lower courts.

Thus it may be seen that the Commission was powerless to prevent the carriers from employing the long and short haul principle. The court's decisions in the Alabama Midland case, however, was far more significant than the Chattanooga care, because in the former the Supreme Court set the precedent by which it overruled the Chattanooga case. However, the Alabama Midland case is particularly significant, because it completed the emasculation of the Act of 1887. After this decision the commission had the power to make reports, and issue protests against the activities of the carriers; but it was deprived, by judicial interpretation, of the power to accomplish any of the functions that congress intended to confer upon it. In fact, so thoroughly effective was the emasculation of the law of 1887 that Professor Miller states, "Indeed on the whole Act there remained as a momento not even a ragged stump of the and instituted proceedings in the courts in the Chattanooga case against the Louisville and Nashville Railroad. In this case the Commission stated that there was conclusive evidence that the carrier had unjustly discriminated against Chattanooga and favored Nashville. To be more specific Chattanooga had a higher rate on goods from New York than Nashville, although the goods destined for Nashville passed through Chattanooga, and were hauled one hundred and fifty-one miles farther. The Commission in this case particularly noted that water competition was only of minor importance, because very few products were hauled on the Cumberland river at that point. Both the lower courts, that is the Circuit Court and the Circuit Court of Appeals, sustained the Commission; but the Supreme Court overruled the decision of the Commission and the lower courts.

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One of the most significant theoretical questions involved in every railroad or public utility case under the due-process clause, is the value of the property upon which the rate of return will be calculated. The first comprehensive attempt of the Supreme Court of the United States to enumerate the factors, which should be considered in determining the rate base upon which the carriers should be premitted to earn a fair return, was that of Smyth v. Ames (169 U. S. 466,898). This case was instituted to determine the validity of a Nebraska statute fixing the maximum rates that could be charged by a carrier in that state. The state counsel stated that the amount of return over the operating expenses was a question of public policy to be determined by the legislature and not by the courts. The counsel for the carriers protested the rates precribed by the state statute, and declared that the rates were so low that the carriers would be unable to secure a fair return upon a fair value of their property. The Supreme Court upheld the carriers. The court stated that all courts, both State and Federal, are obliged, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This statement naturally refuted the claim of state legislatures that they are the sole arbiters of maximum rates within a state. In this decision it is definitely

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[51] Miller, S. L.: "Railway Transportation," p. 753

asserted that the people are entitled to protection against unreasonable railway rates; but that the carriers are also entitled to protection against practical confiscation of their property for the public's benefit. The court stated that the basis of all calculations of the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. The court stated that the following items should be considered in computing the fair value of the carriers property: the original cost of construction, the amount expended in permanent improvements, the amount, the market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under the particular rates prescribed by statute, and the sum required to meet operating expenses. The court desired to convey the idea that the fair value of the carrier's property should be determined; that the fair rate of return on that property should be ascertained; and that rates should be fixed at such a level as to yield a fair rate of return upon the valuation determined. The determination of a fair valuation possibly seems quite simple after a cursory glance at the problem; but after examining the problem it is readily recognized as a very difficult one. This problem, was to become of ever increasing importance to the Commission as the years passed by. A more complete treatment of the factors that the Supreme Court thought ought to be considered in ascertaining railroad valuations will be considered in connection with the Valuation Act of 1913. It is only

important to note here that the problem of railroad valuations and the means of solving it were suggested by the Supreme Court in this Smyth v. Ames case.

The period between 1890-1905 has been classified by many writers as the period of widespread combination or consolidation of the railroads. Though large scale consolidations did not occur until after the panic of 1893, there is some evidence that had seriously contemplated widescale consolidation as early as 1890. Mr. Stickney in his book published in February 1891 stated the following about consolidation, "Consolidation is being much thought of and discussed. It seems to be in the air, and probably many combination will be consummated in the near future."[52] This movement toward combination can be attributed at least partly to adverse legislation. The Act of 1881 which prohibited pooling and other forms of traffic and rate agreements, the application of the Sherman Act to the railroads, and the disbanding of the traffic associations were very important factors in the movement toward combination. Factors are particularly important because they represent the Government's attempts to prevent the carriers from restricting competition. Congress and the Supreme Court failed to recognize that competition might be so severe as to bring about the virtual destruction of the carriers, and that the carriers were aware of the evils of excessive competition, and would use all the means at their disposal to protect themselves regardless of the

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[52] Stickney, A. L.: "The Railroad Problem," p. 227

attitude of the Commission and the courts. The carriers avoided the consequences of the anti-pooling clause, and the decision in the Traffic Association cases by maintaining secret traffic associations, or by a less dangerous and more significant method, namely, combination or consolidation. It would be unwise, however, to attribute the growth of railroad consolidations solely to adverse legislation. The numerous railroad receiverships during the panic of 1893 made it possible for well-managed roads to secure control of numerous poorly managed lines, and thereby made it possible for the numberous consolidations of the period after 1893. The carriers, also, appreciated the economies of large scale operations, and the possibilities of securing more business by extending their lines into new cities and territory. In some instances promoters and directors of railroads sought to secure the control of many carriers in order to manipulate their securities on the stock market for their own individual gain. The carriers also noted that the laws did not prohibit a common individual ownership of several carriers, which would enable those carriers under new control to recoup their losses, and guarantee future dividends by raising rates. Later on combinations were formed to dominate large geographical units over which the railway might act as a dictator in the matter of rates, classification of freights, and the movement undoubtedly was accelerated by the widespread consolidation of industry in the period between 1897-1903.

Combinations were brought about in the following ways: first, consolidation or merger in which two or more existing corporations loose their identity in a single corporation;

second, by means of a lease whereby one corporation transfers the use of its property to another corporation for a period of years or in perpetuity, in return for financial considerations which vary considerably in character; third, through stock ownership of all or a majority of the shares of the corporation, usually achieved by means of a holding company. Consolidations may be very difficult to bring about, for the consolidation is not valid unless authorized by legislative authority, and if the railroad extends over several states, each of the states must approve the consolidation. If the charter of a railroad grants it authority to consolidate, or if any general law was in existence at the time the railroad was chartered, permits it, the consent of only a majority of the stockholders is necessary; otherwise the consent of all the shareholders is required. It is usually extremely difficult to secure the consent of all the stockholders, and this fact alone would explain why consolidations have not been so numerous among the railroads. 53. Combination may also be brought about through the use of a lease. Some of the advantages of a lease are as follows: first, the benefits of unified operation can be secured without new financing; the control of a carrier can be secured by periodic fixed payments; third, the lease is more flexible than a consolidation, especially if it is to run for a short period and bears a contingent rental. The main disadvantage of the lease is that it increases fixed charges. Yhere is also the danger that in times of depression the lessee will be unable to meet the

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53. For a rather thorough treatment of consolidations and leases, see Gerstenberg, C. W., " Financial Organization and Management," pp. 537-606

the payments due the lessor, and insolvency may follow. Though leases have been used in many cases to effect combinations the control of carriers thru stock ownership is employed far more frequent than either leases or consolidations. So far as control is concerned it is not necessary to hold more than a majority of the stock, and in some cases only a minority of the stock is needed for actual control of the management of the carrier. The purchase of stock of other carriers may be financed in several ways. One common way is for the parent company to exchange its stock for that of the company to be acquired. A second, and rather uncommon method among the railroads, is the direct purchase of stock from individuals or thru the stock exchange. A third way, is for the exchange of bonds, particularly collateral trust bonds for the common stock of the carrier. The latter method was very widely used in the combination period.

The importance and magnitude of the movement toward combination is indicated by the following statement of Professor McVey, "The extent to which control of railroad corporations has gone on in America is well shown in the statement that 46 per cent of the nine billion dollars of stock issued by railroad companies is owned by other railway corporations, while but 15 per cent of the bonds, amounting to $1,440,000,000, are held by railway corporations."[54]

It may seem to the reader a bit irregular to have discussed combination at such length in a treatise of this sort. However, a brief discussion of the various types of combinations

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[54] McVey, F. L., "Railroad Transportation," .p. 120

together with the importance of combination in American railway history should serve a twofold purpose; first to demonstrate how relatively simple it was for the carriers to evade the government's regulations on pools and traffic associations and the Sherman Act; and secondly, to prepare the ground for a discussion of the government's attempts to restrain holding companies in the railroad field.[55]

The first serious setback to railroad combination was the Supreme Court decision in the Northern Securities case[56]. The Northern Securities company was incorporated in New Jersey in 1901, after the strenuous struggle between the Harriman interests and the Hill-Morgan interests for the control of the Northern Pacific railroads, to hold the securities of the Great Northern, Northern Pacific, and Burlington systems. The government contended that the control over the Northern Pacific, the Great Northern, and Burlington systems by the Northern Securties Company would effectively put an end to the competition between the Great Northern and the Northern Pacific; and it brought suit in March 1902, to compel the dissolution of the Northern Securities Company on the grounds that it was a combination in restraint of interstate commerce. The government stated that if a giant combinations of this sort were not illegal, the government would be unable to secure, for the people of the country, the benefits of free competition among interstate railways. Since the authorized capital stock

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[55] For a grouping of American railroads by ownership and territory see Johnston, E. R. and Van Metre, T. W.: "Principles of Railroad Transportation," pp. 90-92

[56] See Ripley, W. Z.: "Railway Problems", p. 553-566

of the Northern Securities was $400,000,000, a sum just sufficient at previously agreed rates to acquire all the stock of the two lines, there certainly can be no doubt that the purpose of the holding company was to secure the unity of control over the two lines, inevitably resulting in the disappearance of competition, which had been prohibited in the decision in Pearsall v. Northern Securities Company that the Northern Securities Company is a state corporation, and its control of the stock of the Great Northern and Northern Pacific Railway companies is not inconsistent with the powers conferred by its charter. The enforcement of the Act by congress, against those corporations, will be an unauthorized interference by the national government with the internal commerce of the states creating those corporations. However, the majority of the Supreme Court were not impressed with the arguments of the company, and refused to consider the valid. The court stated that the Sherman Act was a constitutional enactment and that the intent and result of the formation of the holding company was an illegal combination in restraint of interstate commerce. No state henceforth could expect that by merely creating a corporation, it could project its authority into other states in such a way as to prevent Congress from regulating interstate commerce or to exempt a corporation engaged in interstate commerce from the regulations established by congress for such commerce. As a result of this decision the Supreme Court declared the combination illegal and enjoined the Northern Securities Company from voting the stock of the Great Northern and Northern Pacific Railroads, and it enjoined the railroads from paying dividends on their stock to the Northern Securities

Company.

The decision of the Supreme Court declaring the Northern Securities Company illegal was of signal importance, mainly, because it was the first example of a holding company being forbidden as a combination in restraint of trade. The decision tended to discourage the formation of both railroad and industrial holding companies. The foregoing would appear to indicate that this decision had seriously affected the relations between the Great Northern and the Northern Pacific. However, the actual effect of the decision upon the carriers was slight, because the stocks of both roads were transferred to the identical stockholders, and it was practically inevitable, under those conditions, that the stockholders would maintain satisfactory relations between the carriers. In other words the former community of interests was reestablished, and the possibility of competition being restored was less remote than before the Northern Securities Company was formed, despite the fact that the court had intended to bring about the restoration of competition between the carriers. Even though the Supreme Court decision in the Northern Securities case failed to accomplish the desired results, it was of signal importance, because it demonstrated that the holding company was no longer an effective means of effecting a monopoly.

The next application of the Anti-Trust law to railroads was the government suit brought against the Terminal Railroad Association of St. Louis, decided by the Supreme Court in 1912. The Terminal Association was formed in 1889 by a number of railroads having terminals in St. Louis, with the avowed purpose of uniting and operating the independent terminals under a single system. The only competition this organization

met after it was formed, was from the Wiggins Ferry. Competition was later increased by the erection of Merchant's Bridge in 1890. Railroads were at first forbidden the right to become stockholders in the Merchant's Bridge Company; but this restriction was later removed by Congress, and the terminal association secured control of the bridge. The Association also secured control of the Wiggins Ferry in 1892, after the struggle between the Rock Island Railroad and the Terminal Association was terminated by an agreement in which the Rock Island transferred its shares in the Wiggins Ferry in return for being admitted to joint ownership with the other railroads of all the terminal facilities controlled by the Terminal Association. These conditions continued until 1912. At that time, although twenty-four carriers converged at St. Louis, not a single carrier passed through the city. The agreement between the members of the Association was arranged so that each one of them had an absolute veto over the joint use or control of any terminal facilities by a non-proprietary carrier. It is evident that the Association had the power to retrain and interfere with interstate traffic. Thus the evidence was sufficient to warrant a suit in the courts for violating the Sherman Act. The court stated that the Terminal Association was illegal, because the exclusive control of the reasonable means of entering the city, by less than all the companies compelled to use them, violates sections one and two of the Act, in that it is a combination in restraint of commerce between states, and an attempt to monopolize commerce among states which must pass through St. Louis. The Supreme Court directed the District Court to compel the Terminal Association to permit not after it was formed, was from the Wiggins Ferry. Competition was later increased by the erection of Merchant's Bridge in 1890. Railroads were at first forbidden the right to become stockholders in the Merchant's Bridge Company; but this restriction was later removed by Congress, and the terminal association secured control of the bridge. The Association also secured control of the Wiggins Ferry in 1902, after the struggle between the Rock Island Railroad and Terminal Association was terminated by an agreement in which the Rock Island transferred its shares in the Wiggins Ferry in return for being admitted to joint ownership with the other railroads of all the terminal facilities controlled by the Terminal Association. These conditions continued until 1912. At that time, although twenty-four carriers converged at St. Louis, not a single carrier passed through the city. The agreement between the members of the Association was such as to that each one of them had an absolute veto over the joint use or control of any terminal facilities by a non-proprietary carrier. It is evident that the Association had the power to retain and interfere with interstate traffic. Thus the evidence was sufficient to warrant a suit in the courts for violating the Sherman Act. The court stated that the Terminal Association was illegal, because the exclusive control of the necessary means of entering the city, by less than all the companies compelled to use them, violates sections one and two of the act, in that it is a combination in restraint of commerce between states, and an attempt to monopolize commerce among states which must pass through St. Louis. The Supreme Court directed the District Court to compel the terminal association to permit and existing or future railroad to acquire joint ownership and control of the terminal facilities or without becoming a joint owner to secure the use of those facilities upon just and reasonable terms. All disputes between the Association and those desiring to join it were to be referred to the courts. This decision may appear relatively unimportant to the reader, but it appears extremely significant, because it serves to illustrate the progress made in railroad regulation since the destructive decrees in the earlier cases brought before the Supreme Court.

The most important railroad case instituted under the provisions of the Sherman Act was the dissolution proceedings against the Union Pacific-Southern Pacific combination.[57.] In this case the Supreme Court stated that any combination that established a single control over railroads engaged in interstate commerce whereby competition was restricted or suppressed, was forbidden by the Sherman Act. The court specifically stated that the Sherman Act not only applied to the control of carriers through holding companies, but to the purchase by one railroad of the controlling portion of the stock a competing line, even though a majority of the stock was not acquired. Thus the control of 46 per cent of the Southern Pacific stock by the Union Pacific was declared illegal on the ground that even though it was not a majority control, it was an actual control over the policies of the Southern Pacific. The Union Pacific later sold their stock in the Northern Pacific and Atchison Topeka and Santa Fe and

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[57.] Ripley, W. Z.: "Railroad Finance and Organization," New York, 1916, pp. 561-570

and the Government's bill was dismissed on that charge. However, the Supreme Court ordered the dissolution of the Union Pacific-Southern Pacific combination. The lower court was directed to prevent the voting of the stock of the Southern Pacific, as long as it was either owned or controlled by the Union Pacific. Dividends were not to be paid on Southern Pacific stock, except to a receiver appointed by the lower court, as long as that carrier remained under the control of the Union Pacific. The court, however, stated that it was not opposed to the Union Pacific's control of the Central Pacific, if that could be arranged, for such a combination would connect the Missouri River with San Francisco as contemplated by the acts of Congress that authorized the construction of those roads. The court refused to permit the Union Pacific to distribute its Southern Pacific stock pro rata among its shareholders, because it considered such a distribution of the stock of the Southern Pacific merely a means of perpetuating their control, since the Union Pacific stockholders could continue to choose the directors, and manage the policies of the Southern Pacific. After several plans had failed, through the opposition of the Supreme Court and the California Railroad Commission, a final plan was agreed upon in July 1918. By this plan the Union Pacific was obliged to dispose of all its Southern Pacific stock. Thirty per cent of the stock was transferred to the Pennsylvania Railroad in return for $42,000,000 of Baltimore and Ohio stock owned by the Pennsylvania Railroad or its subsidiaries. The remainder of the Southern Pacific stock was to be offered to Union Pacific and Oregon Short Line stockholders at $88. per share. However, the stockholder was allowed to exercise this option, only if he filed an affidavit stating that he was securing the stock for his own benefit and

not acting for persons seeking the control of the Southern Pacific for the benefit of the Union Pacific. This dissolution of the Union Pacific-Southern Pacific combination was successful. The Government literally "killed two birds with one stone," because it effected the dissolution of the Union Pacific combination and divested the Pennsylvania of its ownership of Baltimore and Ohio stock, a competing line, with a single decision. In concluding the discussion of this Union Pacific-Southern Pacific dissolution, it is important to compare the results of this dissolution with the results achieved in the Northern Securities company dissolution in 1904. In the former there was an actual dissolution, one which effectively prevented the application of the community of interests principle, while in the latter the Government's action, instead of seriously effecting the traffic agreements between the Northern Pacific and the Great Northern, actually strengthened the relations between the carriers so as to make them more effective after the Government action than before it. Possibly the most significant point brought out by the decision was that in the future monopoly or restraint of trade achieved, through stock ownership, or control through holding companies would be equally illegal before the law, even though their holdings do not constitute a majority of the stock of the companies in question.

Because of limitations on space, we cannot pretend to discuss completely the story of railroad combination cases. It seems advisable at this point to return to the discussion of the Federal laws passed after the Elkins Act in 1903 and trace the development of actually efficient regulation of the railroads by the Federal Government.

Chapter Five

The Hepburn Act and its Interpretation in the Courts

One of the difficulties that hindered the Interstate Commerce Commission from effectively carrying out the provision of the Act of 1887, was the refusal of the courts to grant priority to cases instituted by the Government or the Commission. As a result of this refusal, there was an intolerable delay in redress of grievances because all definitive proceedings were postponed until the case had gone on appeal to the courts. In fact the average duration of cases carried through the courts was not less than three years, and in certain cases nine years elapsed before the final decision in the case was handed down by the Supreme Court.

The Expedition Act was passed on February 11, 1903 to expedite the hearing and determination of cases arising under the Act of 1887 and the Sherman Act of 1890, and to reduce the delay of court procedure which so seriously hindered the commission in carrying out its orders. The Act provided that in any suit in equity brought in any Circuit Court of the United States under the Act of 1887 or the Sherman Act, or other acts having a like purpose, in which the Government was a complainant, the Attorney General might file with the clerk of the court a certificate stating that in his opinion the case is of general public importance. Whereupon the case should be given precedence over others and expedited in every way, and be assigned for hearing at the earliest possible day in a court comprised of not less than three Federal Court judges. Appeals must be made to the Supreme Court directly within sixty days from the entry of the decree of the Circuit Court. This Act aided the Commission in speeding up the trial of cases instituted by it; but it failed to speed up

those suits filed by individuals seeking damages from the railroads arising from their violation of the law.

Although the Elkins Act of 1903 (previously discussed) was effective in limiting the practice of personal discrimination it failed to solve that problem entirely, and it rendered little aid in effecting a solution of other very important problems of railway regulation, such as those of securing reasonable rates, of increasing the powers of the Commission, of regulating railroad accounting, and of preventing other types of railroad discrimination. Although the Elkins Act required the observance of published railroad tariffs, it did not grant the commission power to revise unreasonable or discrimnatory tariffs. The commission had sought such authority in vain. As early as 1904 President Roosevelt, in his message to congress, made the enactment of further railroad regulation a major issue. The House of Representative, acting upon the President's wishes, passed the Esch-Townsend Bill by the overwhelming majority of 326-17; but the Senate, dominated by railroad influence delayed action pending an investigation, and directed the commission to make an investigation of the railroad conditions in the country. This investigation brought out facts which stirred up widespread public indignation. The most prominent facts brought out by the commission's investigation were: first, the growth of large scale railroad combinations centered the control of our railroads in a few hands; second, that the carriers exacted unreasonable and monopolistic railroad rates; third, that favoritism was shown grant industrials and trusts, and fourth, one that literally fanned public indignation to white heat, namely the exposure of the details of a thoroughgoing and minutely planned scheme to

influence public opinion by every means from bogus convention to garbled and misstated news. In December 1905 the president repeated his recommendations of 1904 concerning railroad regulation. The House passed the Hepburn bill by an even greater majority than the Esch-Townsend bill, namely 346-7. The Senate undoubtedly would have ignored this widespread public indignation, had not a series of events focussed public opinion on the railroad's unjust and discrimnatory actions. The Senate, however, was unable to withstand the public indignation aroused by disclosures of unjust discrimination by the Atchison Topeka and Santa Fe, the investigation of the insurance conditions in New York under the leadership of Charles E. Hughes, the anthracite coal strike,[58] the Pennsylvania coal car scandals, the report of the commissioner of corporations on the transportation of petroleum, which showed that the Standard Oil was still receiving special favors and rebates,[59] the discovery of unsanitary conditions in the meat packing industry, as portrayed in Upton Sinclair's novel "The Jungle", and finally a very serious tie up in railroad service. As a result the Senate passed the Hepburn Act by the exceptionally large majority of 71-3, though the recorded note fails to indicate the intensity of the struggle over the bill in the Senate; because many Senators, knowing that the Bill would pass, cast their vote with it so as to appease their constituents. The Hepburn Act became law on June 29, 1906.

It seems advisable in a paper of this sort to discuss the

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[58] See Martin A. E.: "History of United States," Boston, 1931, vol. II pp. 455 f.f.f.

[59] See Ripley, W. Z.: "Railroad Rates and Regulation," N.Y. 1922 pp. 200 f.f.f.f.

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[58] See Martin, A. E., "History of United States," Boston, 1931, vol. II pp. 480 f.f.f.

[59] See Ripley, W. Z., "Railroad Rates and Regulation," N.Y. 1912 pp. 500 f.f.f.

Hepburn Act at some length, because it was the most important Act concerning the railroads since 1887. The Hepburn Act remedied many of the defects of the Act of 1887, and was a major factor in the establishment of effective Government regulation of the railroads. The Hepburn Act failed to change the wording of the paragraphs of the original Act and Elkins Act relating to reasonableness of rates, facilities, discrimination, long and short hauls, and pooling, except as subsequently mentioned, for these clauses continued to express the indulging purposes of federal regulation. The Act, however, made several important changes in other sections of the law.

The main provisions of the Act are as follows:

1. The regulation of the Interstate Commerce law concerning "Common carriers" shall apply also to companies carrying oil by pipe lines, express companies, sleeping car companies, all switches, tracks and terminal facilities, and that "transportation" in the eyes of the law will include all car regardless of their ownership, and all service in transit.

2. The issuance of passes is specifically prohibited except to employees and for religious and charitable purposes. The penalty shall apply to both giver and receiver of passes.

3. It prohibited the carriers, after May 1, 1908, from transporting commodities that it was financially interested in except lumber and its products.

4. Carriers shall be obliged to provide whenever practicable and at reasonable terms, switches to those companies whose business is sufficient to warrant them.

5. The Act made more explicit the regulations concerning the posting and filing of tariffs, and the exceptance of the through rates

quoted in such tariffs by the carriers taking part in the haul. Penalties were set for violations.

6. This section states that any person or corporation, whether carrier or shipper who purposely grants gives or solicits, or accepts rebates is guilty of a misdemeanor, and if convicted shall be liable to punishment by a fine of not less than $1,000 or more than $20,000. Offenders shall also be liable to imprisonment for a term not exceeding two years, or both fine and imprisonment at the discretion of the court. In addition, the acceptor of the rebate shall be obliged to pay the Government three times the amount of the rebate.

7. Section seven provides for the publication of the reports of the commission, and their acceptance as evidence.

8. This grants the Commission the power, if upon complaint it finds that a rate is unjust or unreasonable, or unduly discrimnatory or preferential, to determine and prescribe a maximum rate to be charged thereafter. This provision included through rates, and the apportionment of the rate between the carriers. The order of the Commission were to take effect in not less than thirty days, and to be in effect not more than two years, unless suspended by the Commission or the courts.

9. This provision gives the Commission the power to award damages against a carrier in favor of a complainant.

10. This provision gives the Commission the power to apply to a circuit court for the enforcement of its order, unless it is for the payment of money. Appeals by either party will be brought before the Supreme Court. No order of the Commission shall be set aside unless after a hearing and not until after five days notice to the Commission.

11. This provides for the rehearing by the commission upon application at its discretion.

12. This section provided that detailed annual reports made out by all carriers under oath, and they shall be filed with the commission within three months after the end of the year to which they apply. The commission might also demand monthly reports of earnings and expenses and other special reports. The Commission was also allowed to prescribe the forms of all records and accounts of the carriers, and no other accounts were permitted. The commission was given the power to investigate the accounts of carriers at any time. Penalties of $100 to $500 per day were set for violations of foregoing provisions. More severe penalties were provided for violations of the following type, those persons who willfully made false enteries, who willfully neglected to make full or correct entries, who destroyed records, or who kept other records than those approved by the Commission. The courts were given the jurisdiction to issue a writ to compel the common carriers to comply with the provisions of this section.

13. Provides that a common carrier issuing through bills of lading shall be responsible for the loss, or injury to the property on other carrier's lines, and the carrier issuing the way-bill is to collect the damages from the carrier upon which the damage occurred.

14. The Interstate Commerce Commission was increased by this Act from five to seven members, with seven instead of six year terms, and with an increase in salary from seventy-five hundred to ten thousand dollars per year.

Section I Oil pipe lines were placed among the common carriers to avoid abuses connected with Standard Oil pipe lines., who gave

lower rates to the Standard companies than the independents, and who were able to transport oil at rates that would be positively ruinous to the carriers. Sleeping car companies were probably placed under the restrictions on common carriers in order to avoid the recurrence of disturbances similar to those attending the strike of the Pullman Palace Car Company employees in 1894.[60.] The control over switches and tracks was probably inserted to eradicate discriminations arising from private owned tracks and switches, whereby companies received rebates in the form of excessive allowances from railroads for the use of these switches and tracks. Terminal facilities were placed under the authority of the commission so as to prevent terminal companies from discriminating against certain carriers. In view of this provision the grounds for the Supreme Court decision in the suit brought against the Terminal Railroad Association of St. Louis in 1912 (previously referred to) are quite obvious. The statement that "transportation" in the eyes of the law will include all cars regardless of their ownership, and all service in transit, was evidently inserted to curb the practice of granting excessive allowances by the carriers for the use of private car, This provision probably was directed particularly against the Standard Oil, the Sugar Trust, and the Meat Packers, who were granted rebates after 1903 despite the provisions of the Elkins Act.

Section three was inserted to prevent carriers, like the Pennsylvania Road, from owning their own coal mines and other raw materials, and shipping coal into the markets at a lower cost

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[60.] See Martin, A. E.: "History of United States," Vol. II p.p. 319-322 for a brief account of this strike.

than coal mine operators could, because the carriers did not charge themselves the regular rate. It was also directed at the Southern Pacific because that road owned oil wells, and was handling its own oil at a lower rate than that charged other shippers. This section is often called the "commodity clause".

Section four was aimed at preventing carriers from refusing to grant switching facilities to certain shippers. Section six showed that congress realized that the Elkins Act had not satisfactorily eliminated the practice of discrimination, for it reinstated the clause providing imprisonment as punishment for granting rebates, and made it applicable to both the receiver and the giver. This section aided greatly in preventing discrimination, but it did not curb discrimination entirely.

Section eight was one of the most important parts of the Act. Since the Supreme Court decision in 1897 in the Cincinnati Freight Bureau case, in fact until 1906, the Commission's authority over rates was confined to the determination of whether certain specific rates were unreasonable or not, but it had no right to substitute reasonable rates for those determined to be unreasonable. However, by this section of the Act the Commission was granted the authority to set maximum rates on freight and also set maximum allowance that could be made by a carrier for the use of special cars and etc. The importance of this clause was considerable, because it gave real power to the Commission, instead of the power to merely decide whether rates were unreasonable or not.

Section twelve is very important, because it is only through carefully regulated accounting practice that the Commission will be able to prevent wilful violations of the Elkins and Hepburn

Acts. This section was directed particularly against personal discrimination and corrupt mangement of the railroads. It is important to note here that although this phase of the Commission's activities is far less spectacular than some of the others, there can be no question but that it has been of great value.

Having briefly discussed the provisions of the Hepburn Act and pointed the purposes and significances of its most important sections, it is advisable to turn to a discussion of the actual effects of the Act.

The first important direct effect of the Act was that it greatly increased the volume of business of the Commission. Up to 1905 there were only 65 formal and 568 informal complaints brought before the Commission; but in the next two years the number of formal complaints had reached 415 and the informal 5,516. The commission also handled 8,755 loss and damage claims, and awarded $570,000 in damages. The number of separate railroad tariffs was reduced greatly after the Act. From the 193,900 separate schedules in 1906, the number was reduced to less than half that figure five years later. However, the activities of the commission afforded no true measure of the benefits resulting from the law. The real improvement cannot be measured by figures; but is to be found in the better feeling prevalent between railroad officials and their customers. The small shippers could be assured of prompt and courteous service in the future. The commission had, in the next few year, many petty complaints on misrouting, a practice whereby goods were carried by roundabout routes rather than by the shortest route. The Commission usually found in favor of the complainant in these cases.

In considering the effectiveness of the 12th section of the

Act, one must not assume that merely because the Hepburn Act stated that uniform accounts should be kept by the carriers, that the railroads immediately acquiesced to this ruling. The Commission discovered shortly, two major obstacles that prevented the maintenance of uniform accounts by officers and employees of the different carriers. The first obstacle was that the carriers interpreted this section in various ways; but this difficulty was gradually overcome by the Commission, for that body interpeted the law so as to meet and obviate the major difference and discrepancies. The other obstacle is the direct violation of the principles expounded by the Commission. These violations are often quite difficult to check, because they consist of misstatements made in the operating accounts or property accounts. Replacement costs, chargeable to operating expenses are often charged to the property account, and betterments chargeable to the property account are frequently included in the operating expenses. Several other difficulties met in enforcing an accurate handling could not be adequately eliminated, because the Commissions staff, was not large enough. Despite of these difficulties, there can be no question but that the Commission's work has been of great value.

Though the Act of 1906 did not specify the grounds upon which the Federal Courts could annul the orders of the commission, The courts, however, have in practice, confined their activities to a consideration of the law, leaving unquestioned the Commission's findings as to facts that are based upon hearings before the commission. The Supreme Court in 1906 in the Illinois Central Railroad Company v. I.C.C. case stated, "And the findings of the act, one must not assume that merely because the Hepburn Act states that uniform accounts should be kept by the carriers, that the railroads immediately acquiesced to this ruling. The commission discovered shortly,[1] two major obstacles that prevented the maintenance of uniform accounts by officers and employees of the different carriers. The first obstacle was that the carriers interpreted this section in various ways; but this difficulty was gradually overcome by the Commission, for that body interpreted the law so as to meet and obviate the major differences and discrepancies. The other obstacle is the direct violation of the principles enounced by the Commission. These violations are often quite difficult to check, because they consist of misstatements made in the operating accounts or property accounts. Replacement costs, chargeable to operating expenses, are often charged to the property account, and betterments chargeable to the property account are frequently included in the operating expenses. Several other difficulties met in enforcing the accounts handling could not be adequately eliminated, because the Commission itself, was not large enough. Despite of these difficulties, there can be no question but that the Commission's work has been of great value.

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Commission are made by the law "prima facie" true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. In the case at bar, these considerations are reinforced by a concurrent judgment of the circuit court."[a] Thus the Commission was protected permanently from the farmer abuse caused by the failure of carriers to present all the evidence in the cases before the Commission. Although it is to be noted in this case that the Supreme Court upheld the Commission, the mention of a concurrent judgment by the Circuit Court probably indicates that some reliance was still placed in judicial judgments concerning questions of fact. Later in the Illinois Central Coal Car Distribution case in 1910 the court definitely accepted the finality of the Commission's findings by stating, "Plain as it is that the powers first stated are of the essence of judiciary authority...it is equally plain that such perennial powers lend no support whatever to the proposition that we may under the guise of exciting judicial power usurp merely administrative functions by setting aside a lawful adminstrative order...upon our conception as to whether the administrative power has been wisely exercised."[b]

The Burnham, Hanna, and Munger case in 1910 demonstrates the purpose of the Supreme Court to allow the commission wide powers in the exercise of its offices. In this case, certain Missouri River cities protested that rates from the Atlantic seaboard to the Missouri River were undully high. Compared with the rates to those cities between the Mississippi River and Buffalo. The Commission decided in favor of the complainants, and ordered a reduction in that part of the rate West of the Mississippi, while the rates in the Central Traffic Association,

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a. I.C.C. v. Illinois Central Railroad Co. 215, U.S. 452-478
b. 215 U.S. 452, 470

commission are made by the law "prima facie" true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. In the case at bar, these considerations are reinforced by a concurrent judgment of the circuit court."[a] Thus the commission was protected permanently from the former abuse caused by the failure of carriers to present all the evidence in the cases before the Commission. Although it is to be noted in this case that the Supreme Court upheld the Commission, the mention of a concurrent judgment by the Circuit Court probably indicates that some reliance was still placed on judicial judgments concerning questions of fact. Later in the Illinois Central Coal Car Distribution case in 1910 the court definitely accepted the finality of the Commission's finding by stating, "plain as it is that the powers just stated are of the essence of judicial authority,...it is equally plain that such perennial powers lend no support whatever to the proposition that we may under the guise of exerting judicial power usurp merely administrative functions by setting aside a lawful administrative order...upon our conception as to whether the administrative power has been wisely exercised."[b]

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[a] I.C.C. v. Illinois Central Railroad Co. 215 U.S. 452-472

that is the cities and territory East of the Mississippi and North of the Ohio Rivers, remain unchanged Thus it may be readily seen that the cities on the Missouri benefited considerably by this decision. The Western roads, alone affected by this order, carried the decision of the Commission before the courts, and protested that the commission did not possess the power to apportion out the country into zones that are tributary to given trade centers to be predetermined by the Commission, and non-tributary to others. The Supreme Court stated that if the commission attempted to raise or lower rates for the purpose claimed by the carriers, it would be an abuse of its power; but if the Commission sought to correct rates inherently unreasonable, such an action would not become invalid through its incidental effects upon trade conditions. The Supreme Court further held that the Commission was acting within its powers, and that the commission's decision could not be judicially reviewed upon its merits. One needs only to compare this decision with the one rendered in the maximum rate case in 1897[61]. to discover how greatly the powers of the Commission had been increased during that period of thirteen years.

The Portland Gateway case in 1910 brought out a defect in the Act of 1906. This concerned the right of the Commission to designate through passenger routes. Seattle, Washington, may be reached from the Middle West by the Northern Pacific from St. Paul, or from Kansas City ghrough the Burlington road. Both these roads at that time were controlled by Hill. The Harriman lines (Union Pacific in this case) reach Portland, Oregon; but at

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[61] see pp. 50ff

Portland the traffic is transferred to the Hill lines. The Hill lines afforded through service to Seattle, but if passengers were carried over the Union Pacific Lines to Portland, great inconvenience often followed from the refusal of the Hill lines to co-operate at this transfer point. In other words the Hill lines sought to secure the long haul over their own lines rather than the short haul over the Union Pacific route. The Commission, after its investigation, ordered the Northern Pacific to join with the Union Pacific in establishing through routes via Portland to Seattle. This decision was based upon the clause of the Hepburn act stating that the Commission was permitted to establish through routes provided no reasonable or satisfactory through route exists. The Northern Pacific stated that there was a through route to Seattle already and hence the clause was not applicable to this case. The Circuit Court set aside the order of the Commission upon the ground that a satisfactory alternative route already existed. This decision was reaffirmed by the Supreme Court in 1910. However, the carriers secured a very hollow victory in this decision, because within six months congress specifically authorized the Commission to regulate such matters in the future, without limitation as to the existence of other available routes.

To complete this discussion of the judicial interpretation of the Act of 1906 there remains only a consideration of the difficulties encountered in the enforcement of the "Commodity Clause". The first decision concerning this clause was handed down in the U. S. v. Delaware and Hudson Railroad case in May, 1909. The Delaware and Hudson owned stock in a coal company, the output of which passed over its lines. Normally

one would expect that the "Commodity Clause" would cover such a condition; but the Supreme Court, though it upheld the constitutionality of the Act, held that the ownership of stock in a corporation did not constitute legal ownership of the property of the company, and that though the carrier owned stock of the coal company, it possessed no interest in the coal which would make it subject to the Commodities Clause. The Supreme Court also pointed out that even though the carrier legally owned the coal at the mine, it might escape the provisions of the law by selling the coal at that point. By this decision the Supreme Court not only practically destroyed the effectiveness of this clause, but clearly indicated a method by which the law could be evaded. The Government brought suit against the Lehigh Valley Railroad, and this case was brought to the Supreme Court for further interpretation. The Supreme Court, however, aided the Government's cause by stating in this case that it was in violation of the law to use stock ownership for the purpose of destroying the entity of a producing corporation, while still commingling its affairs in administration with those of the railroad so as to make the two corporations virtually one. The decision did not achieve the expected results, for the carrier immediately readjusted its affairs so as to comply with thelaw. The carrier, however, found it necessary to organize the Lehigh Valley Coal Sales Company, because of its inability to distribute pro rata among its stockholders,the stock of its subsidiary coal company, for that stock was pledged under a general mortgage. To avoid this difficulty, the stock of the newly organized coal sales company was passed out to the stockholders of the Leheigh Valley Railroad on a pro rata basis. The coal produced by the coal company was sold

at the mouth of the mine to the newly organized Leheigh Valley Coal Sales Company through a contract between the two. Thus, it may be seen that by means of this corporate structure the carrier was able to control the coal company as effectively as ever and still avoid the consequences of the commodity clause. Much of this corporate ingenuity since the Leheigh Valley case was decided in 1911 was wasted for in 1915 the Supreme Court in the Lackawanna Case, (U.S. v. Delaware, Lackwanna and Western R.R. Co.), decided in 1915, stated that the drawing of mere corporate lines could not be permitted to obscure a real identity of interest, and ordered the railroad and coal properties to be separated in spirit as well as in name. Thus the Supreme Court finally interpreted the law in the way that congress had desired. In the future there was to be an actual separation of railways and producing corporations.

On the whole the attitude of the Supreme Court, was well summarized in the Pacific Coast lumber case (I.C.C. v. Union Pacific Co.) decided in January 1912. The court stated that the decisions of the Commission are final unless (1) beyond the power it could exercise constitutionally; (2) beyond its power as stated in the statute or (30 based upon a mistake of law. However, questions of fact may be involved in deciding questions of law, so that an order may be set aside if a) if the rates are so low as to be confiscatory, and thus violate the law by taking property without due process of law, or b) if the commission arbitrarily acted against the evidence and fixed unjust rates, or c) if the authority therein involved has been exercised in such an unreasonable way to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of power The court specifically stated, "In determining mixed

questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony it would have made the same ruling." Hence it may be readily seen that the Supreme Court recognized the supremacy of the Commission in matters of federal regulation of the railways, and that it would not interfere with its orders on economic or public policy grounds as long as the orders were within the powers enjoyed by the Commission.

Until July 1, 1908, only a single case was appealed to the federal courts concerning the provisions of the Hepburn Act. 62 However in the last half of that year, sixteen suits were filed to set aside the orders of the Commission. Nine more were instituted in 1909, and thirteen in 1910. As a result no less than thiry-six suits were before the Circuit Courts in 1910 and the courts's dockets were thoroughly congested. With this the author will the discussion of the Hepburn Act and its interpretation and turn to a description of the conditions that brought about the Mann-Elkins, and the provisions of the act itself.

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62 See Ripley, W. Z., " Railroad Rates and Regulation," p. 557

Chapter Six

The Mann-Elkins Act and its Interpretation

As a result of the carriers' refusal to accept the findings of the commission without testing them before the courts, there developed an insistent demand for more stringent regulations of the railroads. This demand was stimulated by the reversal of the commission's findings by the Supreme Court in the Delaware and Hudson,[63] and other cases. Then, too, there was a threatened increase in rates, due to increased costs of transportation resulting from a rise in the price level of commodities. The Commission sought more power to order, to properly handle certain cases before it dealing with the Transcontinental rate structure. Finally, Congress, was in control of the insurgent Republicans and Democrats, who favored more drastic regulation of the railroads. In addition to this pressure of public opinion, it is well to state that the Commission still lacked the power to suspend rate increases; to fix minimum rates; to regulate freight classifications; to regulate the security issues of the carriers; or to make valuations of the carriers' property. The Commission was able to exercise a very limited control over the physical operations of the carriers and over water routes. Even though the Alabama Midland case[64] in 1897, deprived the Commission of the power to enforce the long and short haul clause, this situation had not been remedied by the Hepburn Act of 1906. In order to set up adequate regulation of the railroads it was quite necessary that these defects be remedied. With this purpose in mind, Congress passed several minor laws between 1906 and 1910, but these

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[63] See p. 82

[64] See p. 53

Chapter Six

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As a result of the carriers' refusal to accept the findings of the commission without testing them before the courts, there developed an insistent demand for more stringent regulations of the railroads. This demand was stimulated by the reversal of the commission's findings by the Supreme Court in the Delaware and Hudson,[83] and other cases. Then, too, there was a threatened increase in rates, due to increased costs of transportation resulting from a rise in the price level of commodities. The Commission sought more power in order, to properly handle certain cases before it dealing with the Transcontinental rate structure. Finally, Congress, was in control of the Insurgent Republicans and Democrats, who favored more drastic regulation of the railroads. In addition to this pressure of public opinion it is well to state that the Commission still lacked the power to suspend rate increases; to fix minimum rates; to regulate freight classifications; to regulate the security issues of the carriers; or to make valuations of the carriers' property. The Commission was able to exercise a very limited control over the physical operations of the carriers and over water routes. Even though the Alabama Midland case[84], in 1897, deprived the Commission of the power to enforce the long and short haul clause, this situation had not been remedied by the Hepburn Act of 1906. In order to set up adequate regulation of the railroads it was quite necessary that these defects be remedied. With this purpose in mind, Congress passed several minor laws between 1906 and 1910, but these

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[83] See p. [illegible]

[84] See p. [illegible]

failed to seriously alter the situation of railroad regulation. Thus on June 18, 1910 the Mann-Elkins Act, designed to remedy the defects of the Hepburn Act, was signed by the President and became a law.

The principal changes instituted by the Mann-Elkins Act of 1910 are as follows:

The famous long and short haul clause was finally amended by the removal of the phrase "under substantially similar circumstances and conditions." This apparently unimportant alteration had the effect of removing the grounds of the Supreme Court decision in the Alabama Midland case, and restoring to the clause its original significance.

The Commission was given the power to suspend proposed changes in rate or classification for 120 days, while the Commission investigated the reasonableness of the change. If the hearings concerning the new rates were not finished at the end of this period, the Commission could continue the suspension for another six months, after which the rates would become effective unless the commission disapproved of them. This clause was inserted to protect shippers from losses resulting from reductions in rates.

A third very important section established a court of commerce with jurisdiction over four types of cases: first, all cases for the enforcement of any order of the Commission except those involving the collection of money, the collection of a forfeiture or penalty, or criminal punishment; second, all the cases instituted to set aside in whole or part any order of the commission; third, all suits instituted under the Elkins Act to enjoin illegal discriminations or departures from published rates; fourth, all

proceedings concerning the enforcement of the law regarding the publicity of accounts, the compulsion in the movement of traffic, or the furnishing of facilities. The Commerce Court was directed not to issue injunctions, except in cases where irreparable damage would follow.

Another important provision of the Act provided that thereafter all cases brought before the Commerce Court or the Supreme Court shall be prosecuted under the control of the Attorney General. Thus by this provision the prosecution of cases in the courts was transferred from the Commission to the Department of Justice, and the confusion of the governmental powers in the past, arising from the fact that the Commission having rendered an opinion was obliged to appear in court and defend it, was avoided.

The Commission was also given the authority to set maximum rates, not only upon complaints but after it had conducted a hearing upon its own motion. Though the Commission might have been given this power by the Act of 1906, its authority on this question was uncertain; and Congress decided to grant the Commission this power beyond dispute. The Act also gave the Commission control over freight classifications, a power exercised by the Commission since 1906, but not expressly conferred upon it. By this Act shippers were permitted to designate by which of two or more through routes their freight was to be carried, subject of course to exceptions that the Commission might prescribe. The railroads or their employees were forbidden to disclose information concerning the amount, place of destination, or consignee of any shipment, and such disclosures were made illegal. This section was aimed at the practice of railroad employees, disclosing the business activities of small concerns to their large competitiors. By this

Act the President was authorized to appoint a commission to investigate questions relating to the issuance of stocks and bonds, and the power to regulate them. The President asked Congress to give the Interstate Commerce Commission the authority to regulate the issues of railroad securities, but the Commission did not receive that authority until a later date.

In discussing the effects of the Mann-Elkins Act, we will first consider the activities of the Commerce Court established by that Act. In the first year thirty-six cases were transferred to it from the various Federal Circuit Courts, and fifty-seven suits in all were placed upon its docket up to December 20, 1911. All but three of these cases were directly concerned with the orders of the Commission, and forty-four were brought by the carriers to set aside the Commission's decisions. In handling these cases the Commerce Court acted as check upon, rather than co-ordinating with the Commission. In all but three out of thirty important cases, the court decided in favor of the railroads, and against the commission and the shippers. Even in these three cases the Commerce Court decided that two of the cases were outside its jurisdiction, while in the third the carriers had already accepted the Commission's decision. Because of the trend of the Commerce Court's decisions, a bitter campaign was waged in Congress in 1912 to abolish the court. Congress passed a bill abolishing the court in that year, but the President prevented its enaction by his veto. This action by congress was undoubtedly prompted by the impeachment proceedings brought against Judge Archbald of the court, which resulted in his impeachment on January 13, 1913. Public opinion finally brought about the abolition of the court by means of the Urgent Deficiency Act of

October 22, 1913, which provided that the court be dissolved on the last day of the year. The jurisdiction of the Commerce Court was transferred to the district courts, and all sections of the Act of 1910 relating to the Commerce Court were repealed.

Even before the Commerce Court was dissolved, the Supreme Court substantially curtailed the activities of the Commerce Court as an intermediate judicial body. In the Proctor and Gamble Company case that company complained of certain regulations concerning demurrage on their tank cars. The Commission upheld the carriers, and the complainant appealed to the Commerce Court. That tribunal decided in favor of the shippers. The Commission, however, appealed to the Supreme Court and that body unanimously affirmed the right of the Commission to decide such matters. The Supreme Court held that the Commerce Court had usurped powers, which if substantiated, would result in frustrating the legislative public policy which led to the adoption of the act. In the "Restrictive Rate case" (32 Supreme Court Rep. 742) the Supreme Court again flatly reversed the opinion of the Commerce Court, and decided in favor of the Commission. This case concerned the right of railroads to charge a different rate for carrying coal to the railroads than to other shippers, the carriers intending to use the coal for fuel. The Commission decided against this practice, but the Commerce Court overruled it in favor of the carriers. However, the Supreme Court refused to notice any difference between coal intended for the carriers and commercial coal, and as a result overruled the Commerce Court's in favor of the Commission.

Sufficient has been stated to indicate the policies of the Commerce Court and the Supreme Court's attitude toward that body.

We will next turn to a discussion of rate decisions rendered by the commission after the Act of 1910. In 1910 the carriers in the East and Middle West petitioned the Commission for higher rates within their respective territories. The carriers claimed that wages had risen without corresponding increases in efficiency of operation; that prices of railroad supplies had increased; that the costs of operation were far higher because of higher taxes and the public's demand for safety appliances, expensive stations and terminal facilities. They sought higher rates also to attract new capital into the industry. The Commission in refuting the testimony of the carriers stated that the net earnings of the carriers in 1910 were higher than in any previous year, and the dividends paid in that year were higher than ever before. It was also time that wages had increased, but not as rapidly as railroad revenues, and thus profits of the carriers were greater. The Commission noted that though some prices had advanced, the general level of prices was lower in 1910 than in any year during the period between 1910 and 1910. As a result of this reasoning the Commission on February 22, 1911, refused to grant rate increase desired by the carriers.[65].

The next major case was the so-called Five Per Cent case, decided on July 29, 1914. Though the Commission found in this case that the net operating income of the railroads in the Official Classification Territory--the territory East of the Mississippi and North of the Ohio Rivers--to be smaller than was demanded in the public interest, it gave little immediate relief. However, it approved, with certain exceptions, a five per cent increase in the Central Freight Association territory, the Western

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[65] See appendix for a summary of the numerous rate cases involving this phase of the Act.

part of the Official Classification territory. It refused to grant the five per cent increase to the other two sections of the Official Classification territory, namely, New England and the Eastern trunk line territory, because it thought their revenues should not be increased in the manner suggested by the railroads. The Commission advised the carriers that the carriers could increase their revenues by raising rates on certain commodities not bearing their fair share of the burden and by higher charges for special service rendered by the carrier. The World War broke out shortly and its first effect was to reduce the volume of traffic carried by the railroads. The carriers, therefore, asked for a rehearing of the Five Per Cent rate case, and the Commission granted their request. The Commission handed down its decision in the case on December 16, 1914. The Commission stated that because of the World War it was essential that the carriers be able to adequately take care of the public's requirements. However, the railroad revenues had declined when it was extremely important that they be adequate. Moreover, the suggestions offered in the decision of July 29 could not become operative at once, and therefore the railroads would not receive the aid to which they were then entitled. Therefore the Commission approved with certain restrictions, the five per cent rate advance requested by the railroads.

On July 30, 1915 the Commissions though it granted some increases in rates, denied practically all the increases desired by the carrier of the Western Classification. On June 27, 1917 the Commission though it refused to permit a general increase in rates for the carriers of the country, did grant rate increases in a few instances. It is important to note in concluding this

brief discussion of the Commission's activities under the clause of the Act of 1910 relating to maximum rates, that the cases were decided for the most part adversely to the railroads. The cases also indicated that the Commission would not sanction an increase until the need thereto had been proved.

In apply Section Four of the Act of 1887, as amended on 1910, the Commission found it necessary to lay down rules for its own guidance. Among the more important of these rules was that different rates to be compared, must apply to the same classes of transportation. Export and import freight rates, because they are lower than the domestic rates in many cases, must be each dealt with in a class by themselves, in determing whether a more distant point by having a higher rate predjudiced the rights of intermediate points. In discussing cases brought before it, the Commission recognized that under join circumstances, a heavier rate to an intermediate point might be justified. The first of these exceptions was the existance of a circuitous route which might be operated at a lower cost and would justify the higher rate for the shorter haul very few of this type of petition were granted by the Commission. The presence of industrial or market competition might justify a variation from the normal rate. A third basis of exemption was the existance of active water competition, for the railroads were compelled to meet the competition of water carriers not subject to the Act. A fourth group of exceptions arose from the differences between interstate and intrastate rates . Often a two-cent rate was charged or intrastate while a three-cent rate was employed on interstate traffic. It was especially difficult for the railroads to avoid charging higher rates on through routes than the combined rates

of the intermediate points.

The so-called intermountain rate case afforded the first significant test of the 1910 amendments of the long and short haul. The Rocky Mountain communities protested that the freight rates from all the Eastern territories ranged from twenty-five to one hundred per cent higher than to the Pacific coast, although the goods passed through their territory and were carried several hundred miles further. A carload of first-class freight from Omaha, Nebraska to Reno, Nevada, paid a freight rate of $858; but if it were carried 154 miles further to Sacramento, California, it would cost but $600. This indictment, however, wasnot the most important basis for their complaint, for all recognized the importance of water competition in determing those rates. The second item in the complaint was far more important. The mountain rates were equally important. The mountain rates were equally high from every point East of Denver, a territory over two thousand miles wide. By this, the freight rate, regardless of distance, to Spokane, Washington or Reno, Nevada, regardless of whether the freight was shipped from New York, Chicago, Omaha, or even Denver, was the same. The carriers East of the Mississippi received no more for their share of the haul, When goods were carried to intermediate points thant if they were carried to the more distant points that enjoyed the lower through rates. While it is true that through rates to the Pacific Coast terminals were blanketed from the Mississippi River, all of the intermediate class rates and many of the intermediate commodity rates were graded. The effect of this rate system was to favor the Missouri River cities over the cities on the Mississippi and Chicago.

The Nevada Railroad Commission and the City of Spokane

complained of the discrimination against intermediate points, and carried there cases to the Commission. That body rendered its decision on both of these cases on June 22, 1911. The Commission in these cases agreed that rates to certain cities on the Pacific coast might be lower than to intermediate towns, because of the presence of water competition. Hence rates from Baltimore or New York City to San Francisco might be justly lower than the rate from either of those cities to Reno, Nevada. The rate from Pittsburg to the coast terminals was also effected by water competition, but naturally, not to the same degree. The Commission found it difficult to justify the claim that water competition existed from Omaha to Reno, Nevada. The Commission, applying this principle, divided the country into zones, as follows: zone one included the territory West of a line running North and South including Omaha; zone two included the territory East of zone I and West of a line running North and South through but including Chicago; zone three was the territory West of a line running through Buffalo and Pittsburg but North of the Southern states; zone four was composed if that territory east of zone III and North of the Southern states; and zone five included the territory not embraced by the other zones. Bearing these zones in mind the Commission established a rate system. Goods shipped from zone four, a section in which water competition was effective, to intermediate points might be charged as rate twenty-five per cent more than to the Pacific Coast terminals. Since water competition was not so significant in zone three, the Commission permitted rates from this zone to intermediate points might be fifteen per cent higher than to the Pacific Coast. In zone two water competition was still less important, and the rate to intermediate points

might be only seven per cent higher than the ghrough rate to the Coast. The Commission failed to discover any excuse for higher rates to intermediate points in zone one.

This rate system aided the intermediate points greatly, for the discrimination, which formerly had been as great as fifty or one hundred per cent, was now limited to a maximum of twenty-five per cent. The intermediate points were aided greatly because their grievance was not that rates were too high but they were too high compared with the rates charged to terminal points.

The Commerce Court, in reviewing the decision of the Commission, refused to admit any distinction between the cause for lower rates to the Pacific Coast from Omaha or the Atlantic seaboard. That Court attributed the differences between rates to competitive forces beyond the railroads' control, that is water competition. It appears, however, that the Commerce Court failed to differentiate between water competition and market competion. In fact that body failed to note that the real reason why the rate from Chicago to San Francisco was as low as if dictated by water competition, was that desired to keep Chicago in the Pacific market. This point will be clarrified if one realizes that the Western roads start at Chicago and that they are naturally eager to secure all the traffic possible for their lines. The Commerce Court also declared that the Commission had exceeded its authority in erecting this rate schedule.

The Commission, however, differentiated between market competition and water competition, and asserted that it had the authority to fix rates as prescribed in their rate zoning system. The Supreme Court, however, sustained the Commission on a decision rendered on June, 1914, and thereby overruled the Commerce Court.

In concluding our discussion of the Mann-Elkins Act of 1910 and the Commission's activities under its provisions, it is important to indicate the effect of the Act upon Federal regulation and upon the business of the carriers. It is evident that the Mann-Elkins act represented a further step in federal regulation, whereby the Commission's powers were greatly increased. However it is well to note that federal regulation was still far from being complete, for the Commission still had no power to regulate the issuance of securities; to establish minimum rates; to make physical valuation of the worth of the carriers' property; to regulate intrastate rates whenever they discriminated against interstate traffic; or to adequately regulate service and water routes.

It is time that the rulings of the Commission seriously effected the carrier's revenues. The slight rate increases of 1913 and 1914 came too late to be of immediate value to the carriers. The year 1914 was a disastrous one to the railroads, and in 1915 approximately 42,000 miles of our railroad system were in the hands of the receivers. However, there appear to have been many roads that were prosperous in that period, and think that many economists are prone to overestimate the effects of the Commission's rate policies, for although many of the carriers suffered greatly decreased net incomes after 1910, the class I railroads did not suffer as greatly as most economists believe during the period from 1908 to 1920. The following table will demonstrate the condition of the Class I carriers from 1908 to 1920:

Railroad Earnings[66].

Class I Railroads

Years Ending June 30	Property Investment (Millions of dollars)	Operating Income (Millions of dollars)	Return on investment (per cent)
1908	$13,213	$645	4,89
1909	13,609	732	5.38
1910	14,557	826	5.68
1911	15,612	768	4.92
1912	16,004	751	4.69
1913	16,588	831	5.01
1914	17,153	705	4.12
1915	17,441	727	4.17
1916	17,689	1,043	5.90
1916*	17,842	1,100	6.17
1917	18,574	986	5.31
1918	18,984	682	3.60
1919	19,272	509	2.64

* The second set of figures for 1916 and the period through 1919 are for calendar years.

This table would seem to indicate that the revenues of Class I roads was not very seriously effected by the increasing cost attending the higher commodity price level which rose rapidly after 1910. It would appear that the weak and poorly managed roads must have suffered considerably through decreased net income, for

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[66] See p. Ely, O.: "Railway Rates and Cost of Service," p. 89

even the return on investments in Class I railroads declined from $5.68 in 1910 to $4.12 in 1914. The weaker roads were the carriers particularly affected by the receivership of the period of 1914 and 1915.

Competent economists also claim that the revenues of the carriers in the period between 1910 and 1920 were so low that the railroads were not able to secure sufficient capital to adequately develop their lines to accommodate the greatly increased traffic attending the rapid industrial development from 1910-1920. This is undoubtedly true because even the strongest carrriers were unable to float stock issues in the period after 1910, and had to depend upon bond issues to satisfy their needs for capital. As a result of this the ratio of bonded indebtedness to the total capitalization of many carriers increased from below fifty per cent to as high as sixty-five per cent. The decreased demand for railroad securities was due in part to the fact that the rate of return on industrial investments was much higher thanthat on railroad securities. It does not necessarily follow from this that the earnings of the carriers were too low, because the return on railroad securities might be normal and still compare quite unfavorably with the return to industrials. In other words the earnings on industrials fluctuate more widely than the relatively stable earnings of the carriers. In the period after 1910 the return of industrial securities increased very rapidly. If the carriers were permitted to charge rates that would enable them to secure earnings comparable to those of the industrials in these periods, their earnings would be excessive. Why would the earnings be excessive? The answer to this question necessarily invovles a consideration of the nature of railroad securities.

The investor invests in railroads mainly because of their relatively stable earnings which are in part due to the limited competition and the relatively stable demand for railroad service. In view of this fact can one justify a rate stucture which would enable their earnings to compare favorably with those of industrials in the period of their highest earning capacity? The answer to this question appears to be in the negative, for industrial security holders are entitled to a higher earning because of the greater risk involved in purchasing them, due to the wide fluctuations in earnings. Investors in the period after 1910, and especially from 1914 on, were interested in securing high profits, for prices were rising very rapidly, and were not particularly interested in stable but partly relatively low returns, and this explains the cause for the difficulty the carriers had insecuring additional capital after 1910.

Of course, we realize that the earnings of the carriers were too low in the period after 1910--compared with the commodity price level, but we felt that the lack of interest in railroad securities was not due to that factor alone, but involved a consideration of the nature of railroad securities as compared with industrials, and a comparison of the earnings of the rialroads and industrials in this period.

With this consideration of the effects of the Elkins Act on the railroad earnings, we will conclude our discussion of the Act and turn to a consideration of the Federal Acts relating to railroads passed up to 1917.

Chapter Seven
Miscellaneous Acts after 1910

The ownership or control of water carriers by railroads was a very troublesome problem in 1912. The carriers by refusing to grant through rates to water carriers had throtled water competition at many points. The carriers in some instances also controlled the water carriers and thus prevented free competition between water and rail routes. This was reason to believe that the railroad owned water carriers possibly would acquire control of the lines using the Panama Canal, and thus deprive the people of the country of the benefits of this proposed water competition. In view of this fact congress sought to prevent the carriers from securing control of the lines that were to operate through the Panama Canal, and consequently passed the Panama Canal Act on August 24, 1912. This Act made it unlawful after July 1, 1914 for any railroad or other common carrier to own, lease or control, or in fact have any interest in a common water carrier that operated through the Panama Canal or elsewhere with which the railroad might compete; or in any vessel operating on a water route with which the railroad did or might compete. The Act delegated to the Interstate Commerce Commission the authority to determine whather competition existed or might possibly exist between the rail and water carrier, and the authority to permit the railroads to control water carriers, with the exception of those operating through the Panama Canal, if it were convinced that they were being operated inthe public'sminterest, and would not reduce water competition. In interpreting this provision the Commission refused to allow the railroads to control water carriers if the relations between them lessened water competition even slightly.

As a result of this decision the New Haven was obliged to divest itself of its Long Island Sound water carriers, and the Southern Pacific was forced to give up its control over the Morgan Line and Pacific Mail Company. The Act also provided that whenever the Commission permitted the railroads to control water carriers, the railroads would be obliged to file with the Commission the rates, schedules, and practices of the water carriers, and that those water carriers would be subject to the same regulations as the controlling railroad. By this provision the Commission secured the power to regulate those water carriers under the control of the railroads, but it secured no control over the independent water carriers. In addition the Commission was given the power to effect the establishment of suitable connections between rail and water facilities; to establish through and maximum rates over rail and water line; or to require any railway under agreement to move through tonnage from interior points in the United States to a foreign country to make similar terms with any carrier from the port served to the same foreign country. These provisions were inserted to enable the Commission to bring about suitable relations between the independent water carriers and the railroads, and to prevent dock and port monopolies from excluding independent carriers from enjoying the benefits of the same privileges.

Two months after the Panama Canal was opened, the carriers appealed to the Commission to revise the zone tariffs. The railroads wished to set lower rates on the bulky products that would be carried by water through the canal, and at the same time sought to cut terminal rates without lowering intermediate rates. The Commission granted [illegible] the carriers' demands, and permitted the carriers to lower their terminal rates, without lowering the

intermediate rates on the same percentage basis as prescribed by the Commission in 1911. This latest ruling of the Commission went into effect on April, 1915. Four months later the Panama Canal was closed by land slides, and was not opened until April, 1916. This factor along with the fact that most of the ship tonnage was being used for transatlantic service, brought a protest from the intermediate cities on the ground that water competition was no longer present and thus there was no just cause for the lower rates to coast terminals than intermediate points. The Commission in June 1917 found in favor of the intermediate cities, and not only removed the special relief granted the carriers in 1915, but also revoked the original order of June 22, 1911.

On March 1, 1913 Congress passed the Valuation Act, a far more significant piece of legislation than the Panama Canal Act, and one destined to become of ever increasing importance as the years passed by. Despite the fact that the Smyth v. Ames decision, rendered by the Supreme Court in 1898, recommended that the only basis of determining the reasonableness of rates charged by the carriers must be a fair value of the property used by the carrier, Congress failed to remedy this difficulty until the Valuation Act of 1913. The Valuation Act of 1913 directed the Commission to ascertain the valuation of all the property owned or used by common carriers subject to the Interstate Commerce Commission's regulation. The Act specifically stated that the Commission was directed to ascertain the value of each piece of property used by the carrier in serving the public, the original cost to date, the cost of production to date, the cost of reproduction new, the cost of reproduction less depreciation; and to indicate the methods by which their costs were obtained. The Commission was

also directed to report all other elements of value if any and the methods of valuation employed. In deciding the valuation of a carrier the Commission was to consider the history and organization of the carrier in question, the gross revenue and expenditures, and its security isues. The Commission was ordered to report the original costs of all land, rights of way, and terminals and indicate their present value. The Commission was permitted to adopt its own methods of procedure in ascertaining the valuations, but it was required to report the value of the railroad's property as a whole and separately the valuations of the carrier's property in every state or territory. The Commission was ordered to start its work within sixty days, and to report its investigations to Congress regularly. The carriers were required to assist the Commission in any way that that body might suggest. The Commission was required to consider all extensions and improvements of the carrier's property, and to revise its valuations from time to time. As soon as tentative valuations were completed by the Commission, it was required to give notice to the carrier the Attorney General of the United States, and the Governor of every state in which the carrier had property. If the carriers failed to file a protest within thirty days, the valuation of the Commission would become final. However, if the carrier appealed the Commission's valuation before the allotted period elapsed, the Commission would consider it, and then issue a final valuation. The carriers might appeal to the courts to have the Commission's valuation set aside. However, it was thought that the courts would hesitate to set aside the valuations of the Commission and thereby subsitute their own judgment for that of the government experts.

The Commission organized a separate Bureau of Valuation, and placed Mr. Prouty in charge. To facilitate the collection of data, the work of the Bureau was divided into three parts; the first involved the physical valuation of the carrier's property and was supervised by engineers; the second involved the statistical and accounting attending the investigation, and the third division involved the ascertaining of the value of the carrier's lands.

The task confronting the Commission was truly collossal, and it was unable to complete a single final valuation until after 1920. In a discussion of the Valuation Act, it appears advisable to consider the merits and disadvantages of the bases that are used for the valuation of railroad property, namely, the market value, the original cost of reproduction.

The term market value has been interpreted in two different ways; first it is used to indicate the market value of the securities of a railroad; secondly it is used to indicate the capitalized value of the net earnings of the carrier at the current rate of interest. In the latter, if the earnings of the carrier are $15,000,000, and the current rate of interest is five per cent, the market value of the carrier will be $300,000,000. The use of the market value as a base for valuation has many serious defects. Market value actually has nothing to do with the rate question, for it can be discovered only after the rates have been established. Even if the market value method were used, it would require constant changes in the valuations of the carriers, because both the market value of securities and the earnings which are to be capitalized, fluctuate with business condtions.

The term original cost has been used in two ways; first to represent the amount invested in a carrier from the beginning,

including only those expenditures that may be properly capitalized; and second, to represent the actual cost of the property now employed in serving the public. The former consists of the original property plus additions and betterments. The latter consists of the cost of the present property. If portions of the carrier's property have been abandoned from time to time, the original cost of acquiring them will not be included in the cost of the present property. If correct accounting methods are employed, the original cost of the property plus additions should approximate the original cost of the present property. To illustrate this point, supose a carrier abandoned a branch line that cost $2,500,000. This investment would not be included in the cost of the present property. However, if the carrier had charged annually to operating expenses a sum sufficient to write off the cost of the line, the investment in the carrier would be reduced sufficently to correspond to the cost of the present property. The original cost basis is the fairest basis of valuation, for it measures the sacrifices made by the investors and it is the only basis that can be kept up to date at all times. The main objection to the original cost method is that is is well nigh impossible in many instances to determine the original cost of the carrier's property, because of the irregular accounting practices employed in the earlier years of railway devlopment.

The term cost of reproduction has been employed ih two different senses; it is used to indicate the cost of reproducing the property new, that is without depreciation. The principal objection to this interpretation of reproduction is that the carrier's property is rarely new, but is in a depreciated state. The cost of reproduction is also used to mean the cost of reproducing including only those expenditures that may be properly capitalized; and second, to represent the actual cost of the property now employed in serving the public. The former consists of the original property plus additions and betterments. The latter consists of the cost of the present property. If portions of the carrier's property have been abandoned from time to time, the original cost of acquiring them will not be included in the cost of the present property. If correct accounting methods are employed, the original cost of the property plus additions should approximate the original cost of the present property. To illustrate this point, suppose a carrier abandoned a branch line that cost $2,000,000. This investment would not be included in the cost of the present property. However, if the carrier had charged annually to operating expenses a sum sufficient to write off the cost of the line, the investment in the carrier would be reduced sufficiently to correspond to the cost of the present property. The original cost basis is the fairest basis of valuation, for it measures the sacrifices made by the investors and it is the only basis that can be kept up to date at all times. The main objection to the original cost method is that it is well nigh impossible in many instances to determine the original cost of the carrier's property, because of the irregular accounting practices employed in the earlier years of railway development.

The term cost of reproduction has been employed in two different senses; it is used to indicate the cost of reproducing the property as new, that is without depreciation. The principal objection to this interpretation of reproduction is that the carrier's property is rarely new, but is in a depreciated state. The cost of reproduction is also used to mean the cost of reproducing the property in its present depreciated condition. The major difficulty encountered in the employing of the cost of reproduction method is one of interpretation. Does reproduction in this sense mean the cost of reproducing the property under present conditions or under the original conditions met in costructing the road ? The use of the former will undoubtedly give a far lower valuation than the latter. In determining the cost of reproducing the property, will one employ the present prices of materials, land, and labor, or the "normal" prices of land, labor, and materials. If one employs the year of 1920 as a base for valuation, one will secure a very high valuation, for wholesale prices in that year were 126 per cent higher than in 1913. The use of such a year for a valuation base would be manifestly unfair,and injurious to the public's interest. The adoption of a normal price level is also very difficult, because the commodity price level fluctuates within a wide range over a period of years.

The ascertainment of the cost of reproduction involves first a physical valuation of the property. The engineers make an inventory of the physical property in minute detail. The inventory gives fully itemized the number of yards of grading, locomotives, ties, cars, terminals, stations, bridges, and ect. They must take into account the amount of working capital, materials, and supplies. The inventory of the land,which is of the greatest importance, is usually carried out by a special group of appraisers. After the physical valuation has been completed,and due allowance having been made for depreciation,the next problem is the application

to the various items of the property the prices of the materials, land, and supplies. Here arises the difficulty, already referred to; shall the Commission use the prices of the date when the valuation is being made, or shall normal prices be used, that is the prices averaged over a period of years? The main difficulty confronted here is that normal prices cannot be accurately determined because of the extreme fluctuations in commodity price levels; and even if one regards as normal prices the average prices of the last five years, one may still object that these prices do not show the present cost of reproducing the property. However, the Supreme Court has stated on this point that for the purpose of fixing rates the value of the property employed should be determined as of the time when the inquiry is made. 65. It appears to the author that the Supreme Court did not fully appreciate the significance of this decision, for if the the Commission determined the valuation of a carrier in 1920, the carrier would have secured the benefits of the rise in the commodity price level and thus would have had a far higher valuation than the actual expenditures of the carrier warranted. There seems to be no doubt that the public would be grossly discriminated against under such circumstances, for the valuation would far exceed tha amount expended by the carrier. If the Commission employed the year of 1913 as a base for its valuation, the carrier would be discriminated against, for the Commission would not have allowed the carrier

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65. see 212 U.S. 22 (1909)

the full amount of money expended by it after 1913. However, the Supreme Court stated in the Consolidated Gas case that the valuation of the property of the carrier is to be determined as of the time when the inquiry is made regarding the rates; and if the property, which legally enters into the consideration of the question of rates, has increased in value since it has been acquired, the company is entitled to the benefit of such an increase.[66]

The ascertainment of the cost of reproduction also involves an inquiry into the nonphysical elements of value, for there are other elements of cost in establishing a going concern than the cost of the physical property. Railroad attorneys have sought to secure judicial and commission recognition and approval of as many other elements of value as possible. Some of the more important of these elements of value are: overhead charges, franchise value, good will, and going concern value. The following items are usually included in overhead charges: expenses connected with the organization of the company; expenses of engineering and supervision, including preliminary surveys, the location of the exact, route, the preparation of the specifications and designs, the letting of contracts, and the supervision of construction; interest charges during the period of construction, and contingencies, to cover items of expense that can not be well forseen, yet which are most certain to be present.[67] These elements and others may well be included in the cost of

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66, 212 U.S. 52 (1909)
67. See Jones, E., " Principles of Railway Transportation" p. 297

reproduction; the question is how much allowance to be make for them. This problem is very complicated because very few railroads have the same overhead costs, and most of the original records have been lost. Going value, the uncompensated losses incurred in the development of the business, should not be included in the reproduction costs, for losses incurred in the past, especially those of the days before regulation became effective, can not be fairly included in the valuation. Franchise value represents the value of the privilege to build a railroad,and to operate it in the service of the public. Under the original cost base no allowance should be made for franchise value unless the carrier paid for the privilege; and under the reproduction base no allowance should be made for franchise value unless the carrier would have to pay for the privilege in reproducing the railroad line. The reason for this is that the franchise is given to the railroad subject to the legislative right to regulate rates in such manner as to limit the railroad to a fair return. Good will has been defined as the good disposition that customers entertain toward a particular concern that induces them to continue to patronize it. It is quite obvious that good will is a characteristic of a competitive business only; it can not be applied to a monopolistic concern which the public must patronize whether it wishes to or not.

Another serious objection to the cost of reproduction basis is the consideration of land values. Under this basis the land that cost the railroad little or nothing is entered in the valuation on the basis of its present value. The reproduction; the question is how much allowance to be made for them. This problem is very complicated because very few railroads have the same overhead costs, and most of the original records have been lost. Going value, the uncompensated losses incurred in the development of the business, should not be included in the reproduction costs, for losses incurred in the past, especially those of the days before regulation became effective, can not be fairly included in the valuation. Franchise value represents the value of the privilege to build a railroad, and to operate it in the service of the public. Under the original cost base no allowance should be made for franchise value unless the carrier paid for the privilege; and under the reproduction base no allowance should be made for franchise value unless the carrier would have to pay for the privilege in reproducing the railroad line. The reason for this is that the franchise is given to the railroad is subject to the legislative right to regulate rates in such manner as to limit the railroad to a fair return. Good will has been defined as the good disposition that customers entertain toward a particular concern that induces them to continue to patronize it. It is quite obvious that good will is a characteristic of a competitive business only; it can not be applied to a monopolistic concern which the public must patronize whether it wishes to or not.

Another serious objection to the cost of reproduction basis the consideration of land values. Under this basis the land which cost the railroad little or nothing is entered in the valuation on the basis of its present value. The importance of the matter can not well be exaggerated, for the railroad land constitutes at least one tenth of the value of of the railroad proprty in this country. The cost of reproducing railway structure and equipment may decline, but the cost of reacquiring land seldom declines, for land values tend to rise as the population of the country increases. The advocates of the cost of reproduction theory not only claim that in estimating the cost of reproducing the carriers' property, the railroad is entitled to include land, even donated land, in the valuation; but that the carrier should be allowed to value it at a price in excess of the market value of similar and adjacent land. Is it just that the railroads be allowed to earn a fair rate of return on the fair value of the property donated to the carriers? It appears to the author that such a procedure is not just, because the property was either granted to the railroads at a very low price or given to them outright, and very little of the railway land has been acquired in recent years. It appears beside the point to set a value on the railroad land based on the assumption that the carrier would have to pay that price, if it were to purchase the land at the time of the valuation. It is important to note at this point that the carriers are not purchasing the land at the time of valuation, but acquired it long before that time. The adjacent land test ought to prove satisfactory to the carriers, because it allows the carriers the benefit of the unearned increment, the increase in land value that has resulted from the development of the country, The adjacent land test places a higher valuation on the railroad land than the railroad would be able to secure in

many instances in event of a sale of the property, because of the nature of the railroad property, which stretches in comparatively narrow strips over the country.

The cost of reproduction theory is thus unsatisfactory in many respects as a basis of valuation. Unsatisfactory though it is, it is the most generally accepted basis of valuation for rate purposes, and it must be used, reasonably determined, unless the original cost can be determined. Whatever method is finally decided upon in determining the present value of the property there is no doubt as to the procedure to be employed in the future. The amount upon which the railroads are entitled to earn a fair return should be discovered by means of some basis or combination of bases, and thereafter this figure should be placed upon the books of the carrier as the cost of the property. In the future the valuation should be kept up to date through an accurate record of the actual new investment in the property.

The Commission had the collossal task of deciding upon which of these various bases of valuation to use in ascertaining valuations, and of applying the method agreed upon to all the carriers in the country. Up till our entrance into the World War, the Commission had spent most of its time in organizing and training its personel to properly investigate the actual valuation of the railroads, though it had commenced to collect information on some of the carriers of the country. It is important to note that the task confronting the Commission was so complex that it did not arrive at any final valuations until 1920. In concluding our discussion of the Valuation Act of 1913, it may be said that it would be difficult to

exaggerate the importance of railway valuation after 1913. The basis of valuation and the actual valuation of the carriers had to be determined in the period after 1913. It is sufficient to note that the basis of the valuation is extremely important because upon it rates are to be determined, the maximum capitalization of the consolidated properties fixed, and the base set for a fair rate of return on the carriers' property.

The Clayton Act, which became law on October 15, 1914, contained several provisions dealing with common carriers.[68] Section seven, which did not solely apply to the railroads, provided that no corporation engaged in commerce should acquire, directly or indirectly, any stock in another corporation engaged in in commerce, where the effect of such an acquisition might tend to lessen substantially competition between them, or restrain commerce in any section or community, or to tend to create a monopoly of any line of commerce. The act also stated that the acquisition of stock in one corporation by another, or the combination of two or more corporations through stock ownership, which would tend to lessen substantially competition or to restrain commerce, or to create a monopoly was prohibited by law.

Sections nine and ten of the act had to do with the misconduct of the officials of the common carries. The investigation of the Pujo committee into the "money trust" and the investigation of the Interstate Commerce Commission

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[68] Seager, H.R., and Gulick, C.A., " Trust and Corporation Problems," Pp.422 ff
Jones, E., " Principles of Railway Transportation," pp. 468 fff

into the affairs of the New Haven Railroad, had shown that the officials and directors of the roads had abused the trust placed in them by the stockholders, to the detriment of the latter. The Commission's report in July, 1914 disclosed that a large number of the officials and directors of railroad companies had an interest in other concerns, such as locomotive, car, coal, steel, railway appliance, and ect. So section ten of the act provided that within two years after the approval of the act no common carrier might have any dealings in securities or supplies, or make any contracts for construction or maintenance, to an ammount exceeding $50,000 in any one year, with any concern, when a director, president, manager, purchasing or selling agent of the carrier was also a director, manager, purchasing or selling officer of, or had a financial interest in the concern with which dealings were had, unless the dealings were with the highest bidder in competitive bidding in accordance with regulations prescribed by the Commission. It is to be noted that this section did not forbid the carriers from dealing with concerns in which the railroad officials were interested, but was aimed at preventing unscrupulous railroad officials from robbing the company in that manner. The penalty for violations of this section was a fine of not to exceed $25,000 upon the carrier, and a fine not to exceed $5,000 upon the guilty official or a jail sentence not to exceed a year, or both imprisonment and fine.

Section nine of tne act provieded that every director or officer of a railroad who embezzled, stole, willfully misapplied, or permitted to be misapplied, any of its money, into the affairs of the New Haven Railroad, had shown that the officials and directors of the roads had abused the trust placed in them by the stockholders, to the detriment of the latter. The Commission's report in July, 1914, disclosed that a large number of the officials and directors of railroad companies had an interest in other concerns, such as locomotive, car, coal, steel, railway supplies, and etc. So section ten of the act provided that after two years after the approval of the act no common carrier shall have any dealings in securities or supplies, or make any contracts for construction or maintenance, to an amount exceeding $50,000 in any one year, with any concern, when a director, president, manager, purchasing or selling agent of the carrier was also a director, manager, purchasing or selling officer of, or had a financial interest in the concern with which dealings were had, unless the dealings were with the highest bidder in competitive bidding in accordance with regulations prescribed by the Commission. It is to be noted that this section did not prohibit a carrier from dealing with concerns in which the railroad officials were interested, but was aimed at preventing unscrupulous railroad officials from robbing the company in this manner. The penalty for violations of this section was a fine of not to exceed $25,000 upon the carrier, and a fine not to exceed $5,000 upon the guilty official or a jail sentence not to exceed a year, or both imprisonment and fine.

Section nine of the act provided that every director or officer of a railroad who embezzles, stole, willfully misapplied, or permitted to be misapplied, any of its money, securities,or property, should be subject to imprisonment for one to ten years, or to a fine of not less tham $500, or to both imprisonment and fine.

Conclusion

In conclusion, the author desires to state that he realizes the impossibility of adequately covering federal regulation of the railroads in a treatise of this sort. Owing to limitations, the discussion of federal regulation has been necessarily restricted to a consideration of the events leading to important federal legislative acts, the provisions of the acts themselves, the interpretation of the acts in the courts, and the general results that were achieved by the federal acts.

The period before 1870 was free from any important state or federal legilation, and in fact the public did all it could to further the development of railway lines. In the early 'seventies there was a very severe depression, and the agricultural West was particularly affected by it. The people of the West blamed the railroads for their difficulties, and the Granger Movement which sprang up in the West was largely instrumental in having the Granger laws passed in the western states. These laws were upheld by the Supreme Court in the Munnv v. Illinois case, but were later declared uncostitutional by the Supreme Court in the Wabash case in 1886.

The decision of the Supreme Court in the Wabash case made necessary the enactment of federal legislation. The Interstate Commerce Act of 1887 followed. This act was quite thoroughly discussed in the preceding pages, and it important to note here that though the act created an Interstate Commerce Commission which was apparently granted wide powers, the Supreme Court in a series of decisions stripped the Commission of practically all of its power, so that in 1897 it had merely

the authority to decide whether railroad rates were reasonable or not.

With the passage of the Elkins and Expedition acts of 1903, effective federal regulation of the carriers began. To be sure federal regulation was not immediately complete. The Elkins Act put an end to large scale personal discrimination, but it did not correct many of the evils that still persisted in railroad operation. The Hepburn Act was by far the most important piece of legislation passed since the Act of 1887. The act extended the Commission's authority to companies carrying oil by pipe lines, express companies, sleeping car companies, all switches, tracks, and terminal facilities. The act prohibited carriers from transporting commodities in which they were finacially interested, from granting passes, from discriminating against other carriers by refusing to extend to them favorable switching facilities, The Commission was given the right to set maximum rates, to publish their reports and use them as evidence, to award damages in favor of a complainant, and the power to apply to the circuit courts for enforcement of its orders. The Supreme Court after the passage of the Hepburn Act allowed the Commission wide powers in the exercise of its offices. This policy of the Supreme Court was radically different from the policy that body adopted after the passage of the Act of 1887, and made possible effective regulation of the railroads.

There were, however, a few defects in the Hepburn Act and it had failed to grant the Commission the power to deal with the long and short haul difficulty, and to regulate the transcontinental rate structure. The Mann- Elkins Act amended the long and short haul clause so that it became

effective in the future. A Commerce Court was established with jurisdiction over certain types of cases. The Commission was given the power to set minimum and maximum rates and to regulate freight classifications. The Commerce Court reversed many of the Commissions rulings, but in many cases the decision of the Commerce Court were reversed by the Supreme Court. Flagrant corruption on the part of the Commerce Court led to its dissolution by Congress in 1914. In most cases after 1910 the Supreme Court upheld the Commission, and effective regulation of the railroads was established.

The Panama Canal Act, the Valuation Act of 1913, and the Clayton Act also granted considerable additional power to the Commission.

On the whole the period between 1887 and 1917 may be characterized as one during which the public strived to establish its mastery over the railroads, a highly individualistic industry that keenly resented the interference into its activities. The public's supremacy was established only after a lengthy struggle in Congress, at the polls, and before the courts, but by 1917 effective control over most of the activities of the railroads had been established. With the exception of the power to properly fix minimum rates, the Commission had ample power to regulate rates, for it was able to suspend tarriffs and to fix charges. Although discrimination still persisted, it was no longer a problem of major importance, for the Commission had ample power to cope with local, personal, and commodity discrimination. It is to be noted here that the Commission still lacked the

authority to regulate the issuance of railroad securities; to establish relations between federal and state authorities that would effect harminious rate structures and adequate service in intrastate and interstate traffic; and to fix a a fair rate of return to the investors in railroad securities. The all important problem of railroad valuation had not been settled by 1917, and in fact the problem has not been satisfactorily settled at the present time. The Commission was not absolutely certain that its method of valuation would be accepted by the courts, and no final valuation of any carrier had been reached at the end of the period covered by this thesis.

Although it is claimed that federal regulation of the railroads has been restrictive and punitive rather than constructive, this is readily understandable in view of the bitter struggle attending the public's attempts to establish effective regulation of the carriers. Futhermore, Congress was so overzealous to in its desire to control railroad rates and cooperation, that it failed to establish adequate control of railway finance and labor. If the carriers had been willing to accept the decisions of the Commission, it appears quite likely that the regulation of the carriers would not have been so drastic. In fact one must attribute, in part, the financial prostration of the railways prior to to the period of government operation, to the nature of the control exercised by the Commission.

There are, however, many positive gains attending

federal regulation of the railroads prior to 1917. The public undoubtedly enjoyed lower rates than would have been possible unless the Commission had not regulated discriminatory practices. In addition the railways have been relieved of the pressure of demands for special privileges from big business interests. Furthermore, public regulation served to protect the investors in railroad securities from the corrupt practices of railroad officials. And last, but not least significant, government control assurred the American public that it would be able to ontain uniform and continuous railway service.

APPENDIX

The author considered it inadvisable to insert lengthy charts in the text while discussing the consolidation movement, but he believes the following charts will adequately illustrate the growth and magnitude of the consolidation movement.

Tendency Toward Consolidation in the United States[1]

Mileage over 1000

	1867	1877	1887	1897	1907
Number of railroads	1	11	28	44	51
Aggregate mileage	1,152	13648	55,447	103,566	155,101
Percentage of total	6.69	20.16	43.64	54.85	65.46

Mileage 250- 1000

	1867	1877	1887	1897	1907
Number of railroads	21	63	99	91	79
Aggregate mileage	8,881	27,661	45,225	44,225	38,383
Percentage of total	51.58	40.86	35.7	23.8	16.2

Mileage under 250

Number of railroads	72	362	434	1,023	1,434
Aggregate mileage	7,183	26,388	26,373	40,326	43,464
Percentage of total	41.73	38.98	20.76	21.35	18.34

To complete the evolution of consolidation to the year of 1914, it may be said that in that year there were nineteen groups of carriers, nine of which controlled two-thirds of the railroad mileage of the country.

The following chart, selected from Professor McVey's book, will illustrate the magnitude of of one of the country's largest railrod systems, namely the Vanderbilt system.[2]

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[1] McVey, F.L., " Railroad Transportation ," pp. 114

[2] ibid pp. 68

1 OWNED

Name of Co.	Miles operated	Relation
N.Y.C.& H.R.	3,516.08	Principle operator and holding company
Lake Shore	1,413.71	N.Y.C. owns 90.50% of capital stock
Mich. Central	1,668.05	N.Y.C. owns 89.73% of common stock
C.C.C & St. L.	2,529.67	Lake Shore owns 29.55% cap. stock, and the indiv.of Vanderbilt own majority
Lake Er.& West.	887.00	Lake Shore owns major. cap. stock
N.Y. Chi.& St.L,	523.02	" " " 50.06% " "
Ill. Ind&Iowa	258.64	" " " 97.06 " "
Pitts & L. Erie	185.56	" " " 50.83 " "
Tor.,Ham. & Buf.	89.31	Controlled jointly by N.Y.C.,Can.So., and Can. Pacific
Det.,Tol.& Mil.	133.16	L.S.and Mich. Cent. each own 1/2 Cap.stock
L.E. Alliance& Wh.	61.00	L.S. owns all the capital stock
Chi. & N.W.	7,273.16	No corp.relation,controlled by common inter.
Chi.,S.P.M. & O.	1,657.18	N.W. owns majority of stock

11 Controlled

Phil. Reading	1,603.33	Reading Co. subst. all
Cen. Ry. of N.Y.	676.99	" " owns 52.91 %
15 other Rea. Co.	451.61	" " controls by stock ownership
Del.,Lack & West	947.61	No corp. connections,investments common
Lehigh Valley	1,382.83	Lake Shore owns 7.91 of capital stock
Nat. Dock R.R.	8.64	Lehigh owns all the cap. stock
Hocking Valley	347.00	Lake Shore owns minority of stock
Ches. & Ohio	1,636.00	N.Y.C. owns 8.26 % outstanding stock
Peoria & Pekin Un.	18.14	C.C.C.& St. L. owns 1/8 cap stock,Lake Er. and N.W. also minor owners
Indianapolis Un.	12.64	C.C.C & St.L. owns 2/5, Penn. rest

St.L. Term.,R.R. Assn. 12.64 C.C.C. & St.L. owns a majority of the capital stock

After glancing through these charts, one can readily appreciate the magnitude of railroad consolidation and the diffi- of the task confronting the Commisssion in checking the consolidation movement.

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